Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BOB BAFFERT,

Petitioner,

v.

CALIFORNIA HORSE RACING BOARD, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

NEIL PAPIANO, ESQ. (CSB# 031811)
IVERSON, YOAKUM, PAPIANO & HATCH
624 South Grand Avenue, 27th Floor
Los Angeles, California 90017-3328
Telephone: (213) 624-7444
Facsimile: (213) 629-4563

Counsel of Record for Petitioner
BOB BAFFERT

79 pp

QUESTION PRESENTED

Whether in violation of the uniform holdings of this Court and settled principles of constitutional law as enunciated *in Mitchum v. Foster*, 407 U.S. 225, 242, 32 L.Ed. 2d 705 (1972), and *Pennhurst State Sch. Hosp. v. Halderman,* 465 U.S. 89, 103-105, 79 L.Ed. 2d 67 (1984) (citing *Ex Parte Young,* 209 U.S. 123, 52 L.Ed. 714 (1908)), the Ninth Circuit improperly applied the *Younger* abstention doctrine and improperly reversed the District Court's Judgment solely on the ground of lack of jurisdiction under *Younger v. Harris*, 401 U.S. 37, 27 L.Ed. 2d 669 (1971), where Petitioner's 42 U.S.C. §1983 action and the District Court's Judgment were based on Respondents' secret and intentional destruction of exculpatory evidence in the case, blood samples, before Respondents filed their accusation against Petitioner in a state agency administrative disciplinary proceeding, in violation of Petitioner's due process right to a fair hearing under the principles of *California v. Trombetta*, 467 U.S. 479, 480-489, 81 L.Ed. 2d 413 (1984) and *Brady v. Maryland*, 373 U.S. 83, 87, 10 L.Ed. 2d 215 (1963) (hereinafter "*Trombetta/Brady*").

PARTIES TO THE PROCEEDINGS

The parties in these proceedings are the Petitioner, BOB BAFFERT, America's leading trainer of thoroughbred race horses (hereinafter "Petitioner"), and the Respondents, the CALIFORNIA HORSE RACING BOARD (hereinafter "CHRB" or "Board") and its members, John C. Harris, Sheryl L. Granzella, Marie G. Moretti, Alan W. Landsburg, William A. Bianco and Roger H. Licht[1] and the CHRB's Executive Director, Roy C. Wood Jr., in their official capacities.

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[1] Robert Tourtelot, named in the District Court action as a Defendant, was no longer a Board member when Petitioner filed his 42 U.S.C. § 1983 action, and Mr. Tourtelot was dismissed at the trial level.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

PETITION FOR WRIT OF CERTIORARI 1

Opinion Below 1

Jurisdiction 2

Statutory Provisions Involved 2

Statement of the Case 3

Factual Background and Procedural History 5

REASONS FOR GRANTING THE PETITION 14

CONCLUSION 29

APPENDICES 1a-41a

TABLE OF AUTHORITIES

Page

Federal Cases

Aiona v. Judiciary of Haw.,
17 F.3d 1244 (1994).....26

Brady v. Maryland,
373 U.S. 83, 10 L.Ed. 2d 215 (1963).....i, 2, 3, 4, 9,
..... 13, 14, 17, 18, 19, 22, 23, 24, 25, 27, 28, 29, 30

Butler v. Alabama Judicial Comm.,
245 F.3d 1257 (2001).....19

California v. Trombetta,
467 U.S. 479, 81 L.Ed. 2d 413 (1984).....i, 2, 3, 4, 9,
..... 13, 14, 15, 17, 18, 19, 22, 23, 24, 25, 27, 28, 29, 30

Ex Parte Young,
209 U.S. 123, 52 L.Ed. 714) (1908) .....i, 16

Gibson v. Berryhill,
411 U.S. 564, 36 L.Ed. 2d 488 (1973).....4, 5, 15,
..... 18, 20, 22, 23, 25, 27, 28

Gilliam v. Foster,
63 F.3d 287 (1995).....27

Kugler v. Helfant,
421 U.S. 117, 44 L.Ed. 2d 15 (1975).....4, 23

Lugar v. Edmondson Oil Co.,
457 U.S. 922, 73 L.Ed 2d 482 (1982).....15

Mannes v. Gillespie,
967 F.2d 1310 (1992).....3, 23, 24, 27, 28

Miofsky v. Superior Court (California),
703 F.2d 332 (1983).....16

TABLE OF AUTHORITIES

Page

Federal Cases (cont)

Mitchum v. Foster,
407 U.S. 225, 32 L.Ed. 2d 705 (1972).....i, 15, ... 16, 19, 22

Monroe v. Pape,
365 U.S. 167, 5 L.Ed 2d 492 (1961).....17, 29

Office of Hawaiian Affairs v. Department of Education,
951 F.Supp 1484 (D. Haw. 1996).....16

Pennhurst State Sch. Hosp. v. Halderman,
465 U.S. 89, 79 L.Ed. 2d 67 (1984).....i, 16

Wyatt v. Cole,
504 U.S. 158, 118 L.Ed 2d 504 (1992).....15, 29

Younger v. Harris,
401 U.S. 37, 27 L.Ed. 2d 669 (1971).....i, 2, 3, 4, ... 16, 17, 18, 19, 21, 22, 23, 26, 27, 28, 30

California State Cases

Abelleira v. District Court,
17 Cal. 2d 280 (1941) 21

Board of Med. Quality Assur. v. Superior Court,
73 Cal.App. 3d 860 (1977) 21

Scott v. Meese,
174 Cal.App. 3d 249 (1985) 15

Federal Statutes

28 U.S.C. §1254(1).....2

42 U.S.C. §1983..... i, ii, 1, 3, ... 5, 13, 15, 16, 20, 21, 22, 25, 27, 28, 29

42 U.S.C. §1988.....14

TABLE OF AUTHORITIES

Page

California State Statutes

Business and Professions Code §19431 10
Business and Professions Code §19580 5
Government Code §11517 .....4, 17, 19, 20, 21
Public Contract Code, §10335(a).....10

California State Regulations

C.C.R. §1843 .....6, 11
C.C.R. §1843(d).....24
C.C.R. §1843.1 6
C.C.R. §1858 .....5, 12
C.C.R. §1859.25(a).....10
C.C.R. §1887 (The Trainer Insurer Rule) 11, 12,
.....23, 25, 29
C.C.R. §1888 25

Miscellaneous

CHRB's Horsemen's Handbook 12

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BOB BAFFERT,

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PETITION FOR WRIT OF CERTIORARI

Petitioner Bob Baffert respectfully petitions this Honorable Court for a Writ of Certiorari to review the Opinion and Decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The Opinion of the Ninth Circuit was filed on June 6, 2003 [App. A, 1a-15a], remanding the case to the District Court with instructions to vacate the award of attorney fees and dismiss Petitioner's 42 U.S.C. §1983 action. **The Decision of the Ninth Circuit is based solely on the jurisdictional principles of *Younger* abstention.** [*Younger v. Harris*, 401 U.S. 37, 27 L. Ed. 2d 669 (1971).] Petitioner's civil rights action and the District Court's Judgment were based on the CHRB's secret and intentional destruction of exculpatory evidence, blood samples, in violation of *Trombetta/Brady*, thus depriving Petitioner of a constitutionally fair administrative trial. The Ninth Circuit did not address the merits of Petitioner's

constitutional *Trombetta/Brady* argument, nor did it address the impact of the *Trombetta/Brady* violation on the exceptions to *Younger* abstention, extraordinary circumstances and bad faith. If the Ninth Circuit had recognized the impact of *Trombetta/Brady* on *Younger* abstention, it should not have concluded that the CHRB "had a 'reasonable' expectation of obtaining a valid 'conviction'" in this case.[2] [App. A, 13, 14a.]

JURISDICTION

Petitioner filed a petition for rehearing in the Ninth Circuit. This petition was denied on July 16, 2003. [App. B, 16a.] This Court has jurisdiction under the provisions of 28 U.S.C. §1254(1), and Supreme Court Rule 10 (c).

STATUTORY PROVISIONS INVOLVED

This case arises under the civil rights provisions of 42 U.S.C. §1983 which provide in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, ... [App. C, 18a.]

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[2] This was the basis of the District Court's exercise of jurisdiction. [EOR III, 696-698.] The references to "EOR" are to the record before the Ninth Circuit of the Administrative and District Court proceedings.

STATEMENT OF THE CASE

Petitioner's 42 U.S.C. §1983 action was predicated on the prosecutorial state agency's, the CHRB's, secret and intentional destruction of exculpatory evidence, both blood samples, thereby completely preventing Petitioner from having a fair administrative proceeding in violation of his constitutional right to due process under the Fourteenth Amendment (App. C, 17a) as required by this Court's decisions in *California v. Trombetta* and *Brady v. Maryland* ("*Trombetta/Brady*").[3]

Petitioner respectfully submits that the Ninth Circuit erred in relying on *Younger* abstention. The Ninth Circuit's Decision conflicts with its own holding that **threshold constitutional issues,** such as double jeopardy, are "extraordinary circumstances" requiring the federal courts to accept jurisdiction in spite of *Younger*. [*Mannes v. Gillespie*, 967 F. 2d 1310, 1312 (1992).] **Petitioner submits that *Trombetta/Brady's* constitutional principle (the state's duty to preserve exculpatory evidence) is also a threshold issue of "extraordinary circumstances" requiring the federal courts to decline *Younger* and accept jurisdiction.**

The Ninth Circuit also erred when it failed to consider the impact of the constitutional principles of *Trombetta/Brady* on the "bad faith" issue under *Younger*. [App. A, 13a-14a.] It is undisputed that the CHRB, a state agency, intentionally failed to preserve highly material exculpatory evidence which would have rebutted presumptions relied on by the CHRB to support

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[3] *California v. Trombetta*, 467 U.S. 479, 489, 81 L. Ed. 2d 413 (1984); *Brady v. Maryland*, 373 U.S. 83, 87, 10 L. Ed. 2d. 215 (1963).

its case against Petitioner.[4] Obviously, Petitioner lost any chance to adequately defend himself when the State intentionally destroyed the blood samples. **Since this breach of constitutional duty required a dismissal of the charges under *Trombetta/Brady* before trial [467 U.S. 487], the CHRB's administrative action was obviously brought without a reasonable expectation of obtaining a valid conviction.** [See *Kugler v. Helfant*, 421 U.S. 117, 124, 126 fn.6, 44 L. Ed. 2d 15, 24, 25 fn.6 (1975).]

In addition, the Ninth Circuit erred in concluding that the California administrative procedures (Government Code §11517, App. E, 22a) provide for adequate and timely review of the constitutional issues raised by *Trombetta/Brady* in this case. [App. A, 9a-13a.] This Court stated in *Gibson v. Berryhill*, 411 U.S. 564, 36 L. Ed. 2d 488 (1973), that since *Younger* "contemplates the outright dismissal of the federal suit, and presentation of [the federal] claims...to the state courts...such a course naturally presupposes the opportunity to raise and have **timely decided** by a **competent state tribunal**, the federal issues involved." [*Id.* at 577. Emphasis added.] Patently the multilayered state administrative system under Government Code §11517 prohibits a timely decision in this case; and a legitimate question is raised as to the competency of the state tribunals, a Board of Stewards and the "Board" (all lay persons), to decide federal constitutional issues in the context of this and similar cases.

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[4] The Ninth Circuit relied on these same presumptions in finding under *Younger* that the CHRB had a "reasonable expectation of obtaining a valid conviction." [App. A, 14a, discussed *infra*, p.23.]

Petitioner urges that this case presents questions of exceptional importance affecting not only Petitioner, but all persons who may be similarly situated and accused of a violation of law after the state agency has intentionally destroyed exculpatory evidence. The most important question presented is the Constitutional right to have access to scientific evidence in the state's possession, material to the state's charge. Obviously, when a state agency intentionally destroys scientific evidence in its possession before bringing any charges against its citizens, the resulting constitutional issues of due process must be timely and adequately addressed in a meaningful way. Only federal intervention under 42 U.S.C.§1983 can provide meaningful protection for these constitutional rights. [*See Gibson v. Berryhill,* at 577-580.] The Ninth Circuit did not adequately or properly address these issues.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

After every California thoroughbred race, **urine and blood samples** are collected from the winner and two other randomly selected horses. [C.C.R.[5] § 1858, App. F, 31a.] **Both samples** are required to be analyzed by the CHRB's official laboratory for the presence of prohibited substances in compliance with California's Horse Racing Laws (Business and Professions Code §19580, App. E, 20a), and the CHRB's Equine

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[5] California's Code of Regulations ("C.C.R."). These regulations and all referenced State statutes appear in the Appendices as Appendix E and F.

Medication Regulations (C.C.R. §§1843, 1843.1, App. F, 28, 30a), as well as the CHRB's publicly bid contract with Truesdail Laboratories.[6] [EOR I, 221-225.]

On May 3, 2000, "Nautical Look", trained by Petitioner, won the 7th Race at Hollywood Park.[7] Following the race, two vials of blood and a urine sample were collected from Nautical Look. The urine sample was divided into two containers. One vial of blood and one container of urine (the "official" samples) were sent to Truesdail Laboratories. [EOR IV, 846, 877.] The other vial of blood and urine container were sent to the CHRB's "Split Sample Unit" in Sacramento for storage and safe keeping. [EOR IV, 877.]

However, both vials of blood were secretly and intentionally destroyed on orders and by action of the CHRB's staff without ever having been tested, and even before the Agency's accusation was filed against Petitioner. [EOR II, 291:26-292:9, 300:12-27, 309:12-23; EOR IV, 878, 900.]

The CHRB has a publicly bid contract [EOR I, 225, 226] with Truesdail Laboratories providing for the testing of both the blood and urine samples taken after every race, which specifically provides:

> **In the event that an analytical finding is made in a post race urine sample the corresponding blood sample must also be**

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[6] Obviously, these facts supported the District Court's findings that the CHRB had a duty to preserve the blood samples for their exculpatory value. [*Infra*, pp. 10-14.] Both the Stewards and the Ninth Circuit ignored these factors.

[7] There was no "betting coup". The horse was favored to win according to the "morning line". [EOR IV, 835-836]

> **further tested for the presence of the compound found in the urine sample....** Samples having chemical test findings are to be retained in secure frozen storage until the case has been completely resolved ...."[8] [Emphasis added.]

None of these requirements were met in this case.

Dr. Norman Hester, Truesdail's Director, testified before the Board of Stewards that Nautical Look's **blood sample was not tested; rather, the official blood sample was intentionally destroyed without testing before the urine sample was tested.** [EOR II, 291:26-292: 9, 300:12-27, 309:12-23.]

Dr. Hester testified further that the publicly bid contract between the CHRB and Truesdail had been **modified by an internal "memo" from a CHRB employee** allegedly permitting Truesdail to randomly throw away one-third of all blood samples it received from the California race tracks and **disregard that part of their contract requiring the laboratory to confirm, by an appropriate test of the blood, the presence of the alleged prohibitive substance found in any urine sample.**[9] [EOR II, 291:26-292:28; EOR III, 647.]

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[8] Obviously, if the urine sample contained a prohibited substance, it is likely the blood sample would contain the same substance, if the urine test was accurate. [EOR III, 783-787.] Thus the blood sample should have been "retained" "until the case has been completely resolved."

[9] The unfairness to some trainers is obvious and raises serious questions of equal protection of the laws. Some trainers (whose blood samples are destroyed) are likely to have their licenses affected by a positive urine test, while other trainers would not because their blood samples were preserved and tested negative.

Dr. Ronald C. Jensen, the CHRB's Equine Medical Director, testified that in addition to the destruction of the blood sample by the official laboratory, the CHRB's staff also **intentionally destroyed on June 28, 2000, the split blood sample** held in an evidence locker in Sacramento. [EOR IV, 900, 878-880.] **This occurred after the CHRB had been notified (on May 16, 2000) by Truesdail that the urine sample had tested positive** (EOR IV, 947), **and even before the Complaint was filed against Petitioner on August 14, 2000.** [EOR III, 646.] Neither Petitioner, nor any other horsemen, were notified of the changes in the CHRB's testing practices, or of the destruction of blood samples. [EOR IV, 875-876.]

The CHRB produced an August 17, 1999 memorandum and a similar one dated August 21, 2000 (EOR III, 647, 648) from Roy Minami, a CHRB staff member, allegedly authorizing Truesdail to destroy blood samples.[10] **This action, however, was never approved or authorized by the Board**. Minami is quoted in the February 16, 2002 article in "The Blood-Horse," an international thoroughbred breeding and racing publication [EOR IV, 901], as stating in reference to his memos: "At the time we didn't feel we needed the Board to approve that. . . I was under the direction of the Chairman to restructure the contracts to make things go." However, Ralph Scurfield, the Board Chairman in 1999, is quoted in the same article as stating: "I did not

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[10] The Ninth Circuit referred to this fact as "policy." [App. A, 5a.] As stated herein (pp. 8-10), this was certainly not Board policy, as the Board never discussed the destruction of blood samples with anyone, did not vote on such a historical change in its testing policy, and did not authorize the Staff's action.

have a conversation on that topic." The article further states: "Neither Scurfield nor the other three commissioners who constituted the Board at that time recall voting on or talking about changing the way blood is tested." [EOR IV, 904.] Robert Tourtelot, the Chairman of the Board in 2000 is quoted in the same Blood-Horse article as follows:

> ***I didn't give Minami the authority to write that letter. It never came before the Board.... It's ridiculous to throw out blood that is connected to cases still under consideration. It's a question of destroying potential evidence. We screwed up. Staff did something beyond [its] authority.*** [EOR IV, 904. Emphais added.]

Dr. Jensen, testified that he did not discuss this "policy" change with the Board, and he was unaware of any Board action on this "policy". [EOR IV, 875:5-876:1.] Despite these facts, the Board of Stewards found no fault with the destruction of the blood samples in denying Petitioner's Motion to Dismiss the Accusation under *Trombetta/Brady*.

> While the Stewards are concerned about the circumstances leading to Truesdail Laboratories randomly discarding blood samples, it is our position that the lack of blood samples did not warrant a dismissal of the case before us. [EOR I, 55.]

Obviously, lay judges, who were advised by the prosecutor (the California State Attorney General's office) on legal issues, would be hard pressed to make any other decision.

In addition to being a clear violation of state law[11] and Petitioner's Constitutional rights, this secret policy was in direct contravention of the California Legislature's statutorily enacted legislative intent in its delegation of regulatory authority to the CHRB. California Business and Professions Code, regulating the Horse Racing Industry and the CHRB's equine medication policies and practices, specifically provides in § 19580 as follows:

> (a) It is the **intent of the Legislature** that the board, in its testing efforts to determine illegal or excessive use of substances, **recognize the greater importance of conducting complete and thorough testing of a lesser number of samples in preference to conducting less thorough testing on a greater number of samples.** [App. E, 20a. Emphasis added.]

Additionally, the Regulations impose a duty on the CHRB to preserve blood samples as evidence. C.C.R. §1859.25(a) [App. F, 34a] states in part: **"The Board shall ensure the security and storage of the split sample."** [Emphasis added.] Obviously, as the Board's contract provides, all samples should be retained "until the case has been completely resolved." [EOR I, 226.]

These laws, regulations, common sense and Constitutional requirements of fairness mandate that the "**Board**" (the CHRB) is under a distinct duty to preserve

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[11] Modification of agency publicly bid contracts must comply with the provisions of California's Public Contract Code, §10335(a) [App. E, 26a], and policy changes by the Agency must be voted on by the Board as required by Business and Professions Code §19431. [App. E, 21a.] As stated above, none of these requirements were met.

all blood and urine samples until the case has been fully heard and decided by all appropriate judicial and quasi-judicial bodies. Obviously, it is vitally important that the blood samples be maintained, since they contain the **only direct and scientific exculpatory evidence in defense of the "Trainer Insurer Rule"** (C.C.R. §1887, App. F, 37a), a fact that even the Board of Stewards reluctantly recognized in its Decision (EOR I, 55), and specifically recognized by Robert Tourtelot, the Board Chairman in 2000. [*Supra*, p. 9.]

As both prosecutors and judges at the Stewards' Hearing, the CHRB introduced the urine report from Truesdail Laboratories. [EOR IV, 906.] Since the imposition of a penalty is discretionary, not mandatory, under horse racing Board rules (App. F, 37a), the Board of Stewards, and the Board itself in this case, must rely on other evidence to determine and justify the imposition of any penalties for a violation. To support this requirement, the CHRB charged in its Complaint [EOR III, 646] and relied on §1843 of the CHRB's Regulations, which provides in pertinent part:

> (d) A finding ... that a test sample ... contains a [prohibited] substance ... **shall be *prima facie* evidence that the trainer ... has ... been negligent in the care of the horse and is *prima facie* evidence that the drug substance has been administered to the horse.**[12] [App. F, 28a. Emphasis added.]

Obviously, after the prima facie showing under §1843(d), the trainer should have the opportunity to

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[12] The Ninth Circuit relied on these same presumptions to support its conclusion that the CHRB had a reasonable expectation of securing a valid conviction. [App. A, 14a.]

present evidence to rebut these presumptions. However, the prosecuting authority, the CHRB, intentionally destroyed all of the blood evidence before it was even examined or tested, thus depriving Petitioner of his constitutionally guaranteed opportunity.

Expert testimony was introduced at the Stewards' Hearing from Dr. Steven A. Barker, Louisiana State University's School of Veterinary Medicine and the State Chemist for the Louisiana Racing Commission, that if the blood samples had been preserved and tested quantitatively for the presence of morphine, a negative result or a low level presence of morphine in the blood sample would have been **conclusive evidence that there had been no pre-race administration** of morphine to the horse by Petitioner or his employees. [EOR IV, 973. See also Dr. Barker's Declaration in support of Petitioner's Motion for Summary Judgment. EOR III, 783-787.]

Dr. Barker also testified that a test of the blood sample would support an evidentiary finding that even if the estimated low level trace finding of 73 nanograms of morphine was actually in the urine, it would likely be an unavoidable result of accidental environmental contamination (EOR III, 785-786), a mitigating circumstance in defense of the Trainer Insurer Rule, as set forth in the Horsemen's Handbook published by the CHRB. [App. G, 39a.] Only the testing of both the blood and urine samples, which has been established policy for over 50 years in California racing (C.C.R. §1858 App. F, 31a), could confirm the presence of the substance in any quantity in a horse's system. It is therefore obvious that the CHRB knew that the blood sample contained potentially material exculpatory evidence, a requirement under *Trombetta*. [467 U.S. at

488.] The CHRB obviously knew that Petitioner would not be able to challenge the urine finding without scientific evidence provided by the blood samples. Yet, the CHRB intentionally and secretly destroyed this evidence, held at two different locations, before filing its accusation against Petitioner. This intentional conduct by the CHRB has deprived, and continues to deprive, Petitioner of his Constitutional right to a full and fair administrative proceeding and to the Constitutional right that he be afforded the opportunity to present evidence to meet and rebut the Agency's accusation and evidence. These undisputable facts mandate and fully support the District Court's assumption of jurisdiction and justification for the issuance of a permanent injunction by summary judgment in this case under the civil rights provisions of 42 U.S.C. §1983.

Following the Board of Stewards' Hearing, the Stewards ordered that Petitioner's license be suspended for sixty days. Petitioner timely appealed to the CHRB. When the CHRB Chairman denied Petitioner's request for a stay pending administrative appeal, a stay was obtained from the California State Superior Court on a petition for writ of mandate.

Petitioner filed his federal action under 42 U.S.C. §1983 against the CHRB's Board members in their official capacities. The federal complaint alleges that Respondents violated Petitioner's due process rights by failing to preserve the blood samples, thus requiring dismissal of the administrative proceedings under *Trombetta/Brady*. Respondents filed a Motion to Dismiss Petitioner's 42 U.S.C. §1983 Complaint arguing that *Younger* abstention applied. **The District Court disagreed, concluding that because of**

***Trombetta/Brady*, the CHRB did not have a reasonable expectation of obtaining a valid conviction.** [EOR III, 696-698.] The District Court granted a preliminary injunction and then, on summary judgment, a permanent injunction in favor of Petitioner; and awarded attorney fees to Petitioner pursuant to 42 U.S.C. § 1988. [App. D, 19a.]

The CHRB appealed. The Ninth Circuit reversed and remanded the case with instructions to vacate the award of fees and to dismiss the action solely on jurisdictional grounds under *Younger* abstention. [App. A, 4a, 15a.] A petition for rehearing was denied. [App. B, 16a.] Thus, Petitioner respectfully presents this timely Petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

I. *Younger* Abstention Should Not Be Applied Because State Administrative Procedures Did Not Provide A Timely Or Adequate Consideration Of The *Trombetta/ Brady* Constitutional Violations.

A. The Constitutional Due Process Requirements of *Trombetta/Brady* and 42 U.S.C. § 1983.

It is undisputed that the prosecuting State Agency, secretly and intentionally destroyed exculpatory evidence, the blood samples, the only evidence available to rebut presumptions relied on by the CHRB to support its accusation. The Due Process Clause of the Fourteenth Amendment mandates that states must preserve exculpatory evidence that is material to issues of guilt and/or punishment. [*Trombetta* at 485; *Brady* at 87.] **Further, a violation**

of this constitutional duty to preserve exculpatory evidence requires dismissal of the charges. [*Trombetta* at 487.] The Ninth Circuit's Decision ignores both principles in its reliance on *Younger* abstention. Obviously, an accused cannot have a fair hearing without evidence (intentionally destroyed by the prosecuting State Agency) which could prove his innocence, or mitigate against punishment. The Constitutional due process duty to preserve exculpatory evidence is applicable to administrative disciplinary proceedings by a state licensing agency to ensure the licensee a constitutionally full and fair administrative hearing. [*Scott v. Meese*, 174 Cal.App.3d 249, 256-257 (1985). See *Gibson v. Berryhill*, 411 U.S. 564, 567, 577 (1973).]

"The purpose of [42 U.S.C.] §1983 is to deter state [officials] from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief if such deterrence fails." [*Wyatt v. Cole*, 504 U.S. 158, 161, 118 L.Ed. 2d 504 (1992). Emphasis added.] Further, the Civil Rights Act of 1871, which is the origin of 42 U.S.C. §1983, was passed for the express purpose of enforcing provisions of the Fourteenth Amendment. [*Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 934, 73 L.Ed. 2d 482 (1982).] In *Mitchum v. Foster*, 407 U.S. 225, 32 L Ed 2d 705 (1972), the Supreme Court stated that **"[t]he very purpose of §1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights – to protect the people from unconstitutional action under color of state law."** [*Id.* at 242. Emphasis added.] The Supreme Court "long ago recognized that federal injunctive relief against a state court proceeding can in

some circumstances be **essential** to prevent great, immediate and irreparable loss of a person's constitutional rights." [*Id.* at 242, citing *Ex Parte Young*, 209 U.S. 123. Emphasis added.]

Thus, federal law, 42 U.S.C. §1983, allows a citizen to bring an action for injunctive relief against state officials who, while acting in their official capacities under color of state law, are depriving a citizen of federal constitutional rights. [*Office of Hawaiian Affairs v. Dept. of Education*, 951 F.Supp 1484,1492, 1493 (D. Haw. 1996), citing *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 103-105 (citing *Ex Parte Young,* 209 U.S. 123).] Such an injunction is required in this case, where Petitioner's constitutional right to defend himself is irrevocably lost, and his reputation is being irreparably damaged. Since available state remedies are patently inadequate, Plaintiff should be permitted to vindicate his constitutional rights in a federal forum. The District Court agreed with these principles in denying Respondents' Motion to Dismiss. [EOR III, 681, 696-700.]

B. *Younger* Abstention is the Exception, Not The Rule.

The Ninth Circuit relied on "*Younger* abstention" as the rule for determining jurisdiction of federal courts over ongoing state proceedings. [App. A, 13a. *Younger v. Harris*, 401 U.S. 37, 27 L.Ed. 2d 669 (1971).] However, *Younger* abstention is not the rule but "an **extraordinary** and **narrow exception** to the duty of a district court to adjudicate a controversy properly before it." [*Miofsky v. Superior Court (California)*, 703 F.2d 332, 338 (9th Cir. 1983).] In adopting 42 U.S.C. §1983, Congress intended "to provide a federal remedy where the state remedy, **though adequate in**

theory, was not available in practice." [*Monroe v. Pape*, 365 U.S. 167, 174 (1961). Emphasis added.] Such is clearly the case here. Petitioner will have to endure ongoing deprivation of his constitutional due process rights (a *Trombetta/Brady* dismissal), since there is in practice no adequate or timely state remedy.

1. The "Board" and The "Board of Stewards" Do Not Constitute a Competent State Tribunal on Constitutional Issues.

It is generally true, as the Ninth Circuit points out, that *Younger* abstention is applicable where the state proceedings interfered with (1) are ongoing, (2) implicate important state interests and (3) provide Petitioner an opportunity to litigate federal claims. [App. A, 6a.] While admittedly the state proceedings here were ongoing, and arguably (although not conceded)[13] important state interests are involved, the state proceedings simply do not provide an adequate or timely opportunity to litigate Petitioner's federal claim of constitutional violations. The state remedies are clearly inadequate because of the layered and redundant administrative proceedings under California Government Code §15117 (App. E, 22a) in which only "lip service" was given to Petitioner's constitutional due process claims, as evidenced by the Board of Stewards' Decision. Without citing any authority or reasons for denying Petitioner's Motion to Dismiss the proceedings

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[13] Petitioner asks rhetorically: If important state interests are involved in maintaining the integrity of horse racing, how is that interest advanced by discarding blood samples without testing before an accusation is filed against a trainer? Is preventing the trainer his constitutional right to challenge the State's evidence fostering the integrity of racing? The answer should be "NO."

pursuant to *Trombetta/Brady* (EOR I, 10 ¶25), the Stewards concluded:

> While the Stewards are concerned about the circumstances leading to Truesdail Laboratories randomly discarding blood samples, it is our position that the lack of blood samples do not warrant a dismissal of the case before us. [EOR I, 55.]

In *Gibson v. Berryhill* this Court concluded that *Younger* "presupposes the opportunity to raise and have **timely** decided by a **competent state tribunal** the federal issues involved." [411 U.S. at 577. Emphasis added.] Here, the layered administrative proceedings before the CHRB will not result in a **timely** decision, and the CHRB has demonstrated that it is not a **competent state tribunal** to rule on constitutional matters.

The Agency judges (the "Stewards" and the "Board") consist of lay persons who are unqualified to express an independent and knowledgeable ruling on federal constitutional issues. The same law office prosecuting Petitioner, the State Attorney General's office, is also counsel to the Board and its Stewards, who rely on that office for advice on legal issues. Under these circumstances, the only competent figure to rule on constitutional issues in these administrative proceedings is a federal judge. Not even an administrative law judge would suffice, since that judge's "proposed" decision is ultimately reviewed by lay people, the Board. In the meantime, Petitioner, and other licensees, would continue to suffer damage to their reputations and face enormous expenses in defense of layered administrative proceedings without the benefit of exculpatory evidence destroyed by the CHRB.

The Ninth Circuit's Decision is premised on the *Younger* concept that federal courts should not interfere with ongoing state proceedings, if the state proceedings can sufficiently protect constitutional rights. [App. A, 9a-13a. *Younger,* 401 U.S. at 40-46.] *Younger* abstention therefore rests on an assumption that state proceedings would invariably uphold civil rights – an assumption rejected by *Mitchum v. Foster*, 407 U.S. at 241-243, and obviously untrue here.

2. *Younger* Abstention Does Not Provide For a Timely Review of the Constitutional Issue.

The Supreme Court in *Younger* recognized that irreparable injury will be caused if the challenged action is "flagrantly and patently violative of express constitutional prohibitions." [*Younger,* 401 U.S. at 53; see also *Butler v. Alabama Judicial Comm.*, 245 F. 3d 1257 (11th Cir. 2001).] *Butler* reasoned that for a federal court to defer to state process **that process must "permit a reasonably speedy review of federal constitutional issues."** [*Id.* at 1264. Emphasis added.] The layered proceedings under Government Code §11517 do not permit Petitioner a reasonably speedy review of the federal issues he raised "flagrantly and patently violative of express constitutional prohibitions" (*Trombetta/ Brady*), and do not ensure that his reputation will not continue to be damaged while he undergoes additional administrative hearings at enormous expense without benefit of the exculpatory evidence intentionally destroyed by the CHRB.

The layered administrative proceedings in this case following the Stewards' decision could result in at least three more evidentiary hearings. The appeal from the Stewards' decision would be assigned to the Office

of Administrative Hearings for a trial de nova before an administrative law judge ("ALJ"). Since the ALJ's decision after a full hearing is only a "proposed decision," it would be reviewed by the Board which can either adopt the decision (in which case it would be the final decision of the agency), or the Board could remand the case back to the ALJ for further evidentiary hearings (perhaps one or two times). Thereafter, the Board could reject the ALJ's proposed decision and decide the case itself on review of the record of the Stewards' Hearing. [Gov't Code § 11517. App. E, 22a.] When the administrative process is completed, and only then, could Petitioner file a writ in the California courts to review de nova the final administrative decision. For these reasons, the District Court found that the constitutional violation of the duty to preserve the exculpatory blood samples and the resulting denial of Petitioner's due process right to fair hearings before the Agency, constituted a continuing violation, giving rise to the issuance of a permanent injunction under 42 U.S.C. §1983. [EOR VI, 1357-1362.]

Petitioner will suffer hardship from delayed judicial review in that his reputation as a trainer will continue to suffer[14] while he is required to defend the ongoing administrative proceedings without the benefit of exculpatory evidence which the CHRB intentionally destroyed. Petitioner should not be forced to wait for a

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[14] *Gibson* also noted that the District Court's finding that "the revocation . . . . of appellees' license . . . 'together with the attendant publicity which would inevitably be associated therewith, would cause irreparable damage' to the appellees for which no adequate remedy is afforded by state law." [411 U.S. at 577, fn. 16.] An almost identical situation is present here.

final decision by the CHRB before seeking judicial review of his constitutional claims.[15] Petitioner did not and could not receive a fair Stewards' hearing. Thus it makes little sense to require final action by the State Agency, the CHRB, since part of the harm suffered here is occasioned by the laborious failed procedure and the constitutionally flawed and unfair proceedings. The *Younger* abstention doctrine should not be allowed to defeat a 42 U.S.C. §1983 action where the lack of a **timely** judicial review by the state courts of the constitutionality of the administrative proceedings impacts the adequacy of the state forum.

The Ninth Circuit addressed Petitioner's claims that California's administrative procedures [Gov't Code §11517] are "inadequate" because the agency proceedings are "layered and redundant" and do not provide a "timely" resolution of the federal issues. The Ninth Circuit concluded:

> [5]... As the Supreme Court has made clear, only when the timeliness issue amounts to a procedural bar do we decline to abstain due to inadequacy of the forum. *Pennzoil Co.*, 41 U.S. at 15. Although there are instances in which timeliness plays a role in the adequacy of the state forum, Plaintiff's case is not one of them. [App. A, 12a.]

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[15] Petitioner cannot raise this issue any sooner in the State Court because review by writ of mandate there is not available until all administrative remedies have been exhausted. [*Abelleira v. District Court*, 17 Cal. 2d 280, 292 (1941). See *Board of Med. Quality Assur. v. Superior Court*, 73 Cal.App. 3d 860 (1977) (even if there is a claim of denial of due process).]

Petitioner respectfully disagrees. The United States Supreme Court stated in *Gibson* that since *Younger* "contemplates the outright dismissal of the federal suit, and presentation of [the federal] claims . . . to the state courts . . . such a course naturally presupposes the opportunity to raise and have timely decided by a competent state tribunal, the federal issues involved." [411 U.S. at 577. Emphasis added.] Patently the multilayered state administrative system of lay judges prohibits a timely consideration of the constitutional issues of *Trombetta/Brady* here.

The Ninth Circuit suggests that since Petitioner will ultimately have the chance to bring his federal claim "to the Superior Court in a writ of mandate," there is no procedural bar in this case. [App. 11a-13a.] **This may be true in theory, but it is neither timely nor adequate in practice**. "Timely" in this context, destruction of exculpatory evidence, means consideration and dismissal of the charges before trial. [*Trombetta*, 467 U.S. at 487.]

By the time all the costly administrative proceedings will have occurred, the right to have the accusation dismissed before trial for the *Trombetta/Brady* violation will be lost. This is the gravamen of Petitioner's 42 U.S.C. §1983 action; and Petitioner submits, effectively amounts to a bar to the full measure of the protection of his constitutional rights. For this reason as well, *Younger* abstention is not appropriate in this case.

"The very purpose of §1983 [is] to interpose the federal courts between the states and the people, as guardians of the people's federal rights - to protect the people from unconstitutional action under color of state law." [*Mitchum v. Foster*, 407 U.S. at 242.] This is the

reason the federal courts have jurisdiction to enjoin state proceedings which are violative of federally protected constitutional rights.

II. The Ninth Circuit Failed To Consider The Impact Of *Trombetta/Brady's* Constitutional Violation On The Exceptions To *Younger* Abstention (Bad Faith And The Existence Of Extraordinary Circumstances).

The Ninth Circuit recognized that the district courts are not obliged to decline jurisdiction "if the [state] proceedings are conducted in **bad faith** or...**other extraordinary circumstances exist.**" [App. A, 13a. Emphasis added.] The Ninth Circuit concluded however that neither "exception" applies in this case. [App. A, 13, 14a.] This ruling ignores the *Trombetta/Brady* constitutional violation and its impact on the bad faith and extraordinary circumstance exceptions to *Younger* abstention, and is inconsistent with the decision of the Ninth Circuit in *Mannes v. Gillespie* and the Supreme Court's decision in *Gibson v. Berryhill*.

A. Bad Faith Exists in This Case.

The Ninth Circuit correctly sets forth the standard for "bad faith" under *Younger*:

> In the *Younger* abstention context, bad faith "generally means that a prosecution has been brought without a reasonable expectation of obtaining a valid conviction." *Kugler v. Helfant*, 421 U.S. 117, 126 n. 6 (1975). [App. A, 13a.]

The Ninth Circuit however erred in concluding that Petitioner did not "meet that standard." The Ninth Circuit reasoned that "the Board had a reasonable expectation of obtaining a valid 'conviction,'" under the

Trainer Insurer Rule based on the "positive urine test" and the presumptions relied on by the CHRB pursuant to C.C.R. §1843(d) (App. F, 29a), that the positive urine "was prima facie evidence that the trainer had been negligent in the care of his horse...and that the drug...had been administered to the horse." [App. A, 14a.]

This conclusion, however, ignores the impact of the *Trombetta/Brady* violation on the State's case, particularly the presumptions relied on by the CHRB. Obviously, a "valid" conviction is one based on the entire case, including the licensee's theory and evidence, not just the prosecution's theory and "prima facie" evidence. Under *Trombetta/Brady*, if the prosecution fails to preserve exculpatory evidence, the case must be dismissed and therefore no trial occurs. [*Trombetta* 467 U.S. at 487.] Thus, the CHRB could not possibly obtain a valid conviction in this case, much less entertain a "reasonable expectation" of victory after intentionally destroying the blood samples in violation of *Trombetta/Brady*. This was the result in *Mannes v. Gillespie* [967 F.2d at 1312], and this should have been the result in this case.[16] **There could never be a "valid" conviction in this case, because the *Trombetta/Brady* violation requires dismissal before trial.**

The fact that the CHRB secretly destroyed both blood samples in violation of the U.S. Constitution *(Trombetta/Brady),* and did not comply with its own contract and the state horse racing law, strongly suggests (if not conclusively establishes) that the CHRB acted in bad faith. How can a licensee have a fair trial without evidence supporting the defense theory? **Prosecuting**

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[16] *Mannes v. Gillespie* is discussed in detail at pp. 27, 28.

such cases where the State Agency destroyed exculpatory evidence is "bad faith."

The Ninth Circuit's Decision is also in direct conflict with the conclusion of the United States Supreme Court's decision in *Gibson v. Berryhill*. The Supreme Court held that the district court was not obligated to follow *Younger* and decline jurisdiction of plaintiff's 42 U.S.C. §1983 action because the administrative judges were "biased." [411 U.S. at 577.] Bias, as the Ninth Circuit recognized (App. A, 14a), is essentially an issue of bad faith. Its presence undermines any reasonable expectation of obtaining a valid conviction, just as the *Trombetta/Brady* issue undermines any reasonable expectation of obtaining a valid conviction in this case.

In addition, the Ninth Circuit's Decision ignores the issue of mitigation of "punishment" under *Trombetta/Brady* and its impact on the "reasonable expectation of obtaining a valid conviction." ***Brady* extended constitutional protection to issues of punishment**. [*Brady,* 373 U.S. at 87.] The Ninth Circuit discussed bad faith only in the context of guilt. [App. A, 13-14a.] Lost evidence, however, can diminish or destroy proof of mitigating circumstances on issues of punishment, not just on questions of guilt or innocence.

Since imposition of penalties are discretionary under the Trainer Insurer Rule (App. F, 37a), mitigating circumstances are significant punishment issues in these cases. [App. F, 38a, 40a.] As a result of the *Trombetta/Brady* violation, Petitioner was prevented from producing scientific evidence that there was no administration of the prohibitive substance by Petitioner, rather, its presence in the horse was the result of

accidental environmental contamination, significant mitigating circumstances. [*Supra*, pp. 12, 13.] It must follow, therefore, that the accusation should have been dismissed for this reason. The loss of mitigating circumstances undermines any reasonable expectation of the CHRB in obtaining a valid conviction. Contrary to the Ninth's Circuit conclusion, Petitioner has met the "bad faith standard" in this case. The District Court's exercise of jurisdiction did not violate *Younger*.

B. Existence of Extraordinary Circumstances in This Case Allowed the District Court to Properly Exercise Jurisdiction Even If the Criteria for *Younger* Abstention Were Met.

The Ninth Circuit concluded in its Opinion:

> (b) *There are no extraordinary circumstances.*
>
> Plaintiff's claim of "extraordinary circumstances" is rooted only in the claimed constitutional violation. As discussed earlier, the constitutional dimension of the error claimed does not, by itself, constitute an exception to the application of *Younger* abstention. "Extraordinary circumstances" have not been cataloged fully, **but Plaintiff's case does not approach the example referred to in *Younger*.** *See Aiona v. Judiciary of Haw.*, 17 F.3d 1244, 1248-49 (9th Cir. 1994). ("For example, if a statute 'flagrantly and patently' violates 'express constitutional prohibitions in every clause, sentence and paragraph,' then federal intervention in state court proceedings is appropriate." (quoting *Younger*, 401 U.S. at 53.)) [App. A, 14a. Emphasis added.]

Petitioner adds, neither do any of the other cases finding "extraordinary circumstances."[17] In *Mannes v. Gillespie*, 967 F. 2d 1310 (1992), the Ninth Circuit recognized that a state prosecution which violates the Double Jeopardy Clause, presents an exception to the general rule of *Younger* abstention. [*Id.* at 1312.] Double jeopardy, the Court reasoned, is a **constitutional threshold issue**, which calls for **dismissal** of the accusation without trial. "Because full vindication of the [double jeopardy] right necessarily requires intervention before trial," *Mannes* concluded that "federal courts [could] entertain pretrial habeas petitions that raise a colorable claim of double jeopardy." [*Id.* at 1312.] *Mannes* presented a **threshold issue of constitutional proportions**, "double jeopardy," just as Plaintiff's §1983 action here presented a **threshold issue of constitutional proportions**, a violation of *Trombetta/Brady.* **To give effect to the constitutional violation, both cases require dismissal before trial.** *Mannes* held that because the constitutional violation could bar by dismissal the criminal proceedings (retrial), this presented an exception to the *Younger* abstention principle. [*Id.* at 1312.] The same is true in Petitioner's case. Because the constitutional violation *(Trombetta/ Brady)* could bar by dismissal the remaining administrative proceedings, this presented an exception to *Younger* abstention. Both constitutional violations,

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[17] *Younger* recognized that it may be appropriate to enjoin state criminal proceedings on a "showing of bad faith, harassment or **any** other unusual circumstance that would call for equitable relief." [401 U.S. at 54. Emphasis added.] See also *Gilliam v. Foster*, 63 F. 3d 287, 289 (4th Cir. 1995) ("double jeopardy"); and *Gibson v. Berryhill,* 411 U.S. at 577 (potential "bias" of the lay administrative judges).]

double jeopardy and the *Trombetta/Brady* destruction of exculpatory evidence constitute extraordinary circumstances, even though they do not meet the extreme factors of the Ninth Circuit's quoted example in *Younger*. [App. A, 14a.]

Despite *Younger's* recitation of such an obvious and extreme example of extraordinary circumstances, the Court in *Younger* specifically left the matter open for expansion, stating: "Other unusual situations calling for federal intervention might also arise, but there is no point in our attempting now to specify what they might be." [401 U.S. at 54.]

Petitioner respectfully submits that even if "constitutional attack[s] on state procedures...do not automatically vitiate" the application of *Younger* abstention, as the Ninth Circuit concluded in its Opinion [App. A, 9a], this does not mean that a constitutional issue cannot be the basis for federal jurisdiction ("extraordinary circumstances") even in light of *Younger* abstention. That is exactly what occurred in both *Mannes v. Gillespie* and *Gibson v. Berryhill.*

The Ninth Circuit's Decision is in direct conflict with the principles of this Court's decision in *Gibson v. Berryhill.* The Supreme Court held that the district court was not obligated to follow *Younger* and decline jurisdiction of Plaintiff's 42 U.S.C. § 1983 action because the administrative judges were "biased." [411 U.S. at 577.] Bias in the context of *Gibson* prevented Plaintiff from having a constitutionally fair administrative proceeding and constitutes "extraordinary circumstances" just as the *Trombetta/Brady* issue here undermines any reasonable possibility of having a fair administrative trial in this case.

CONCLUSION

This case presents a question of exceptional importance affecting not only Petitioner, but all trainers and owners of thoroughbred race horses in California and the thousands of employees who rely on the trainers' licenses for their livelihood. That question is the Constitutional right to have access to scientific evidence in the State Agency's possession, blood samples from their horses, to question and rebut unquantitative urine test results and regulatory presumptions of the effect of urine test results relied on by the Agency in enforcing the Trainer Insurer Rule.

"The purpose of [42 U.S.C.] §1983 is to deter State [officials] from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief if such deterrence fails." [*Wyatt v. Cole*, 504 U.S. at 161. Emphasis added.]

The random and intentional destruction of blood samples by the CHRB will force trainers to accept an administrative penalty which may destroy their stable and end their career even though their constitutional rights to due process *(Trombetta/Brady)* have been trampled in the CHRB's grossly unfair administrative proceedings. While the state court remedy (a writ of mandate after all administrative hearings and appeals have been exhausted) may be "available in theory, it is not available in practice." [See *Monroe v. Pape,* 365 U.S. 167, 174 (1961).] To many trainers then, the remedy of appeal to the state court at the conclusion of all the layered administrative proceedings is not available in practice, but in theory only.

Petitioner respectfully submits that the Ninth Circuit erred in its failure to address the impact of the *Trombetta/Brady* constitutional violation on the issues of bad faith and extraordinary circumstances in applying *Younger* abstention.

The secret and intentional destruction of both blood samples in violation of state law, the CHRB's publicly bid contract and particularly the constitutional violation of the principles of *Trombetta/Brady* (the duty to preserve potential exculpatory evidence), constitute both "bad faith" and "extraordinary circumstances" allowing the District Court to exercise jurisdiction in this case, even if all the criteria of *Younger* abstention are met. This breach of constitutional duty required a dismissal before trial. Thus, the CHRB's action was obviously brought in bad faith, i.e., "without a reasonable expectation of obtaining a valid conviction."

The conflict of the Ninth Circuit's Opinion with its own decisions and the decisions of the United States Supreme Court, and the fact that this case involves a question of exceptional importance to citizens engaged in the horse racing industry, require this Honorable Court to grant Certiorari and review the Ninth Circuit's Decision. Upon such review the law, constitutional principles and common sense require reversal of the Ninth Circuit's Decision and restoration of the Judgment of the District Court.

October 10, 2003 Respectfully submitted,

Iverson, Yoakum, Papiano & Hatch
By **Neil Papiano,** Counsel of Record
for Petitioner BOB BAFFERT

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BOB BAFFERT,
Plaintiff-Appellee,

v.

CALIFORNIA HORSE RACING BOARD; ROY C. WOOD, JR., in his capacity as Executive Director of the California Horse Racing Board; and JOHN C. HARRIS, SHERYL L. GRANZELLA, MARIE G. MORETTI, ALAN W. LANDSBURG; WILLIAM A. BIANCO, and ROGER H. LICHT, in their official capacities as members of the California Horse Racing Board,
Defendants-Appellants,

and

ROBERT H. TOURTELOT, in his official capacity as a member of the California Horse Racing Board,
Defendant.

Nos. 02-55858
02-56135
D.C. No.
CV-01-07363-DT
OPINION

Appeals from the United States District Court
for the Central District of California
Dickran M. Tevrizian, District Judge, Presiding

Argued and Submitted
April 10, 2003—Pasadena, California

Filed June 6, 2003

BEST AVAILABLE COPY

Before: Mary M. Schroeder, Chief Judge, Susan P. Graber, Circuit Judge, and James K. Singleton,* District Judge.

Opinion by Judge Graber

*The Honorable James K. Singleton, United States District Judge for the District of Alaska, sitting by designation.

COUNSEL

Jerald L. Mosley, Deputy Attorney General, Los Angeles, California, for the defendants-appellants.

Neil Papiano, Iverson, Yoakum, Papaino & Hatch, Los Angeles, California, for the plaintiff-appellee.

OPINION

GRABER, Circuit Judge:

An administrative proceeding conducted under the authority of the California Horse Racing Board ("the Board")

resulted in an order suspending, for 60 days, Plaintiff Bob Baffert's license to race horses in California. While his appeal from the suspension order was pending, Plaintiff filed this action under 42 U.S.C. § 1983, seeking to enjoin the state proceedings on the ground that the Board had failed to preserve evidence to which Plaintiff was constitutionally entitled. The Board argued that the principles of *Younger* abstention[1] required the district court to decline jurisdiction. The district court nevertheless decided the case. Because we agree with the Board that *Younger* abstention applies, we reverse and remand with instructions to dismiss.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff trains thoroughbred racehorses. Defendants are the Board,[2] which is the administrative body charged with overseeing horse racing in California, and its individual members.

On May 3, 2000, "Nautical Look," a horse trained by Plaintiff, won the seventh race at the Hollywood Park racetrack. As California's regulations require, the track veterinarian took blood and urine samples from the horse. One half of each sample, the "official sample," was sent to a laboratory for testing. The Board retained the other half of each sample, known as the "split samples," which are kept for the purpose of confirming a positive drug test on the official samples. Both the official sample and the split sample of Nautical Look's urine tested positive for trace amounts of morphine.

Several months later, a panel of three Stewards, appointed by the Board, held a formal hearing to consider a complaint against Plaintiff arising from the drug testing of Nautical

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[1] *Younger v. Harris*, 401 U.S. 37 (1971).

[2] Because we hold that the district court erred in exercising jurisdiction over this entire action, we do not address the Board's contentions that it is immune under the Eleventh Amendment and is not a proper defendant for purposes of § 1983.

Look. Plaintiff argued that the presence of such a small trace of morphine in the horse's urine likely was explained by environmental contamination. Environmental contamination is a defense under California regulations, but that defense may be rebutted by evidence that the trainer did not reasonably ensure the horse's protection from such contamination. Extensive evidence was taken on these issues.

At the hearing, Plaintiff learned that the Board had tested only the urine samples. The blood samples had been destroyed. The official blood sample was destroyed pursuant to an August 1999 policy of destroying one-third of all the blood samples submitted to the laboratory. When no request for testing of the split blood sample was made within the 45-day period after the race during which the split sample remained in the Board's custody, that sample was "purged" due to its age.

Following the hearing, the Stewards concluded that Plaintiff "did not meet the standards of mitigating circumstances as set forth in Rule 1888(c) (Defense to Trainer Insurer Rule)" and, thus, that he had violated "California Horse Racing Board rules # 1843(a) (Medication, Drugs and Other Substances — Morphine — Class I) and # 1887 (Trainer to Insure Condition of Horse)." The Stewards ordered that Plaintiff's license be suspended for 60 days. Plaintiff timely appealed that decision to the Board. He also obtained a stay of the suspension pending resolution of the appeal.

While the state administrative appeal was pending, however, Plaintiff filed this federal action under 42 U.S.C. § 1983 against the Board and its members in their official capacities. The federal complaint alleges that Defendants violated Plaintiff's due process rights by failing to preserve the blood samples taken from Nautical Look on May 3, 2000. Defendants argued that *Younger* abstention required dismissal. The district court disagreed. The court granted a preliminary injunc-

tion and then, on summary judgment, a permanent injunction in favor of Plaintiff, and awarded attorney fees to Plaintiff.

The Board now brings this timely appeal. We reverse and remand with instructions to vacate the award of fees and to dismiss the action.

STANDARD OF REVIEW

We review de novo whether *Younger* abstention applies. *Green v. City of Tucson*, 255 F.3d 1086, 1093 (9th Cir.) (en banc), *cert. dismissed*, 533 U.S. 966 (2001).

We also review de novo whether a party is statutorily entitled to attorney fees. *Gilbrook v. City of Westminster*, 177 F.3d 839, 875 (9th Cir. 1999).

DISCUSSION

A. *Abstention*

Younger abstention is a "circumscribed exception to mandatory federal jurisdiction," which applies when there is a pending state proceeding that implicates important state interests and provides the federal plaintiff with an opportunity to raise federal claims. *Green*, 255 F.3d at 1099. If the circumstances giving rise to *Younger* abstention apply, the district court must dismiss the action. *Id.* at 1093.

[1] As a threshold matter, for *Younger* abstention to apply, the federal relief sought must interfere in some manner with the state litigation. *Id.* at 1094. Next, in determining whether abstention is proper, the court must examine:

> (1) The nature of the state proceedings in order to determine whether the proceedings implicate important state interests, (2) the timing of the request for federal relief in order to determine whether there are

> ongoing state proceedings, and (3) the ability of the federal plaintiff to litigate its federal constitutional claims in state proceedings.

Kenneally v. Lungren, 967 F.2d 329, 331 (9th Cir. 1992) (internal quotation marks omitted). Finally, an exception to abstention applies if the state proceedings demonstrate "bad faith, harassment, or some other extraordinary circumstances that would make abstention inappropriate." *Id.* at 332 (internal quotation marks omitted).

Here, Plaintiff seeks to enjoin state administrative proceedings, so there is "no doubt" that the federal injunctive relief would interfere directly with those proceedings. *Green*, 255 F.3d at 1095-96. The parties agree that state proceedings were ongoing. We turn, then, to the remaining considerations.

1. *The state proceedings implicate important state interests.*

Younger abstention applies to actions seeking to enjoin pending state administrative proceedings (as well as state court proceedings) if an important state interest is involved. *Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 627 (1986); *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 433-34 (1982). The importance of the interest is measured by considering its significance broadly, rather than by focusing on the state's interest in the resolution of an individual case. *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 365 (1989) ("*NOPSI*").

[2] California's interest in protecting the integrity of horse racing is expressed in legislation, which is intended to

> allow parimutuel wagering on horse races, while:
>
> (a) Assuring protection of the public.

> (b) Encouraging agriculture and the breeding of horses in this state.
>
> (c) Supporting the network of California fairs.
>
> (d) Providing for maximum expansion of horse racing opportunities in the public interest.
>
> (e) Providing uniformity of regulation for each type of horse racing.

Cal. Bus. & Prof. Code § 19401 (West 2003). Further, the legislature specifically requires the Board to adopt "equine medication" regulations in order to "preserve and enhance the integrity of horse racing in the state." *Id.* § 19580. Preserving the integrity of racing is a significant interest, especially in view of the fact that California permits wagering on horse racing. *See id.* § 19594; *see also id.* § 19461, notes (signing message from Gov. Gray Davis identifying thoroughbred horse racing as "one of California's premier sporting industries").

Whether the state proceedings are "judicial in nature" or "quasi-criminal" also plays a role in assessing the significance of the state interest. *See Ohio Civil Rights Comm'n*, 477 U.S. at 627-28 & n.2 (addressing significance of requirement that the proceedings be "judicial in nature"); *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 13 (1987) (quoting *Juidice v. Vail*, 430 U.S. 327, 335 (1977), discussing application of *Younger* to "quasi-criminal" proceedings); *see also Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975) (holding that *Younger* abstention extends to a state civil proceeding "which in important respects is more akin to a criminal prosecution than are most civil cases").

[3] Here, the Board held an adjudicatory hearing, which is quasi-judicial. Both sides were represented by counsel.

Because a license was at issue and could be suspended or revoked, the state proceedings also were "quasi-criminal." The state's interest in administering such proceedings without interference is thus significant. *Id.* Indeed, Plaintiff does not argue that the state's interest in licensing procedures concerning horse racing are less important, or less "judicial," than licensing procedures concerning lawyers or doctors. *See Middlesex*, 457 U.S. at 437 (applying abstention doctrine in view of pending administrative proceedings to revoke a lawyer's license); *Kenneally*, 967 F.2d at 330-31 (applying abstention doctrine in view of pending administrative proceedings to revoke a physician's license).

2. *The state proceedings provide an adequate opportunity to litigate Plaintiff's constitutional claim.*

Plaintiff primarily argues that the state proceedings do not provide an adequate opportunity to litigate his federal claims. Distilling his arguments to their essentials, he contends that (a) immediate federal review is necessary because the constitutionality of the proceedings themselves is at issue, so applying abstention would disregard the remedial purposes of § 1983; and (b) the multi-layered review of administrative decisions in the state forum will take too long. Established law forecloses those arguments.

(a) *Younger* abstention applies even if the constitutionality of the pending proceedings is at the heart of Plaintiff's claim.

The Supreme Court has "repeatedly rejected the argument that a constitutional attack on state procedures themselves automatically vitiates the adequacy of those procedures for purposes of the *Younger-Huffman* line of cases." *Ohio Civil Rights Comm'n*, 477 U.S. at 628 (internal quotation marks omitted). "[T]he mere assertion of a substantial constitutional challenge to state action will not alone compel the exercise of federal jurisdiction." *NOPSI*, 491 U.S. at 365. *Younger* itself

involved a First Amendment challenge to an ongoing criminal prosecution, but even that was insufficient to require the federal court to ignore principles of federalism and interfere with the state's proceedings. *Younger*, 401 U.S. at 43-45.

Nonetheless, Plaintiff literally claims that "[t]he only competent figure to rule on Constitutional issues . . . is a Federal Judge." Although we appreciate the vote of confidence, *Younger* and its progeny repeatedly and explicitly hold to the contrary. *See Middlesex*, 457 U.S. at 431 ("Minimal respect for the state processes, of course, precludes any *presumption* that the state courts will not safeguard federal constitutional rights."). Saddled with these precedents, Plaintiff's arguments cannot succeed. The substance of Plaintiff's claim does not justify federal interference.

(b) *California's administrative process provides sufficient judicial review so as to constitute an adequate forum to litigate federal constitutional issues.*

Plaintiff next claims that California's procedures for judicial review of an administrative decision are "layered and redundant" and will not provide a "timely" resolution to his federal claims. Thus, he contends, the proceedings are "inadequate." "[T]he burden on this point rests on the federal plaintiff to show that state procedural law barred presentation of [his] claims." *Pennzoil Co.*, 481 U.S. at 14 (internal quotation marks omitted). We must assume that state procedures afford an adequate remedy, in the absence of unambiguous authority to the contrary. *Id.* at 15. Plaintiff's allegations of redundancy and delay do not rise to the level of a procedural bar in this case.

Notably, the proceedings affording judicial review of the Board's decision are not peculiar to that administrative body. To the contrary, Plaintiff's challenge amounts to an attack on California's administrative review procedures as a whole. *See* Cal. Gov't Code § 11517 (West 2003) (providing for appeals

from administrative adjudications); Cal. Civ. Proc. Code § 1094.5 (West 2003) (providing procedures for writ of mandate for judicial review of administrative orders).

In *Kenneally*, we held that California offers an adequate opportunity for judicial review of administrative orders and that *Younger* abstention therefore applied to a physician's civil rights action challenging the revocation of his license. 967 F.2d at 332-33. *Kenneally* presented an even stronger case than Plaintiff's for concluding that the state procedures were inadequate, because it involved a challenge to the constitutionality of a particular regulation, which California's constitution explicitly precludes administrative bodies from adjudicating. *Id.* at 332. Despite Kenneally's inability to obtain redress at the administrative level, we applied *Ohio Civil Rights Commission* and held that the procedure for a writ of mandate offered an adequate opportunity for judicial review of the constitutional claims. *Id.* at 332-33.

[4] By contrast, Plaintiff's federal claims do not attack a regulation or statute as unconstitutional. Rather, he attacks specific evidentiary practices in his case that he asserts amounted to a violation of his due process rights. Plaintiff's claims thus concern the administrative agency's "competence to examine evidence before them in light of constitutional standards." *Dash, Inc. v. Alcoholic Beverage Control Appeals Bd.*, 683 F.2d 1229, 1234 (9th Cir. 1982) (internal quotation marks omitted). Although California's constitutional provisions explicitly preclude challenges to the constitutionality of a regulation in administrative proceedings, those provisions do not affect the competence of an administrative judge to examine evidence in the light of constitutional standards. *Id.*; *Kenneally*, 967 F.2d at 332. Unlike the plaintiff in *Kenneally*, Plaintiff can bring, and has brought, his claims of constitutional error to the attention of the administrative body on appeal. If the Stewards' decision is upheld, Plaintiff will have another chance to bring those claims to the superior court in a writ of mandate. The superior court's decision, if unfavor-

able, may then be appealed all the way through the California court system. Cal. Civ. Proc. Code § 1094.5. If Plaintiff remains dissatisfied with the state courts' treatment of his federal claims, he may seek certiorari in the United States Supreme Court. *See generally Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1874) (discussing Supreme Court's scope of review of questions decided by the highest state courts).

[5] Plaintiff contends that this procedure will take too long. A bald assertion that state proceedings are lengthy does not eliminate the grounds for *Younger* abstention. As the Supreme Court has made clear, only when the timeliness issue amounts to a procedural bar do we decline to abstain due to the inadequacy of the forum. *Pennzoil Co.*, 481 U.S. at 15. Although there are instances in which timeliness plays a role in the adequacy of a state forum, Plaintiff's case is not one of them.

In *Meredith v. Oregon*, 321 F.3d 807, 818 (9th Cir. 2003), for example, we decided that the "unique posture of [the] case" rendered the state forum inadequate on timeliness grounds. (Internal quotation marks omitted.) The plaintiff in *Meredith* established that the peculiar facts of his case interacted with the unavailability of a stay of the state court judgment in such a way that the state courts would *never* have an opportunity to address his federal claims in a meaningful way. *Id.* at 818-19. Because the plaintiff's federal claim involved new evidence that the state forum was barred from reviewing, and the applicable stay procedures would have required the plaintiff to suffer all the consequences of the state's administrative decision before any review of his federal claims had taken place, we concluded that Oregon's administrative procedures in that particular case operated as a complete procedural bar to review of his federal claims. *Id.*

By contrast, here, Plaintiff can litigate his claims fully in the state forum. He has not shown that he will be forced to serve his suspension before he has had a chance to adjudicate

his federal claims in the state forum. To the contrary, until the district court entered an injunction below, the state court had stayed Plaintiff's suspension pending his appeal. Plaintiff has yet to serve the 60-day suspension, and there is no reason to think that he will be forced to do so before his appeal is heard in the state forum.

[6] Plaintiff obviously disagrees vigorously with the result that he has achieved thus far in California. However, his lack of success does not render the forum inadequate. Because Plaintiff's case fits cleanly within the criteria for abstaining under *Younger*, the district court was obligated to decline juris-diction unless some exception applied.

3. *No exception applies.*

[7] If state proceedings are conducted in bad faith or to harass the litigant, or other extraordinary circumstances exist, the district court may exercise jurisdiction even when the criteria for *Younger* abstention are met. *See Gibson v. Berry-hill*, 411 U.S. 564, 578-79 (1973) (holding that *Younger* abstention did not apply to a suit to enjoin a proceeding before an administrative board that had a pecuniary interest in the outcome); *Partington v. Gedan*, 961 F.2d 852, 861 (9th Cir. 1992) (referring to the "'bad faith and harassment' exception" to *Younger* abstention).

(a) *No bad faith is present.*

[8] The district court declined to abstain because it con-cluded that the Board's prosecution was in bad faith. In the *Younger* abstention context, bad faith "generally means that a prosecution has been brought without a reasonable expecta-tion of obtaining a valid conviction." *Kugler v. Helfant*, 421 U.S. 117, 126 n.6 (1975). Plaintiff cannot meet that standard.

[9] The Board had a reasonable expectation of obtaining a valid "conviction." In California, the trainer "is the absolute

insurer of and responsible for the condition of the horses entered in a race, regardless of the acts of third parties." Cal. Code Reg. tit. 4, § 1887(a) (West 2003). If a sample of bodily fluid taken from a horse tests positive, that test is prima facie evidence that the trainer has been negligent in the care of the horse and is prima facie evidence that the drug found has been administered to the horse. *Id.* § 1843(d). Nautical Look's urine sample tested positive for morphine, a Class I prohibited drug. Plaintiff was Nautical Look's trainer. On those facts alone, under the regulations the Board had a "reasonable expectation" of obtaining a valid "conviction."

[10] Nor does the fact that the Board destroyed Nautical Look's blood samples prove bad faith. Nautical Look's blood samples were not singled out for destruction. The samples were destroyed (a) pursuant to a random practice of destroying one-third of the blood samples at the laboratory, and (b) pursuant to the Board's policy of destroying split samples after 45 days if no request for testing has been made.

[11] In the absence of any evidence of bad faith, such as bias against Plaintiff, or of a harassing motive, no exception to the application of *Younger* abstention is warranted.

(b) *There are no extraordinary circumstances.*

Plaintiff's claim of "extraordinary circumstances" is rooted only in the claimed constitutional violation. As discussed earlier, the constitutional dimension of the error claimed does not, by itself, constitute an exception to the application of *Younger* abstention. "Extraordinary circumstances" have not been cataloged fully, but Plaintiff's case does not approach the example referred to in *Younger*. *See Aiona v. Judiciary of Haw.*, 17 F.3d 1244, 1248-49 (9th Cir. 1994) ("For example, if a statute 'flagrantly and patently' violates 'express constitutional prohibitions in every clause, sentence and paragraph,' then federal intervention in state court proceedings is appropriate." (quoting *Younger*, 401 U.S. at 53)).

B. *Attorney fees*

Fees were awarded on the ground that Plaintiff was the "prevailing party." 42 U.S.C. § 1988. For the reasons that we have explained, however, Plaintiff was not entitled to prevail below. Thus, the fee award must be reversed.

REVERSED and REMANDED with instructions to vacate the award of attorney fees to Plaintiff and to dismiss the action.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BOB BAFFERT, Plaintiff-Appellee, v. CALIFORNIA HORSERACING BOARD et al., Defendants-Appellants.	Nos. 02-55858 02-56135 D.C. No. CV-01-07363-DT ORDER (Filed July 16, 2003)

Before: SCHROEDER, Chief Judge, GRABER, Circuit Judge, and SINGLETON,* District Judge

The panel has voted to deny the petition for rehearing. Chief Judge Schroeder and Judge Graber have voted to deny the petition for rehearing en banc, and Judge Singleton has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it.

The petition for rehearing and petition for rehearing en banc are DENIED.

* The Honorable James K. Singleton, United States District Judge for the District of Alaska, sitting by designation.

APPENDIX C

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT 14

Sec. 1. [Citizens of the United States.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereto, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 5. [Power to enforce amendment.]

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX D

UNITED STATES CODE

TITLE 42. The Public Health and Welfare

CHAPTER 21. CIVIL RIGHTS

42 USCS § 1983

§ 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

UNITED STATES CODE

TITLE 42. The Public Health and Welfare

CHAPTER 21. CIVIL RIGHTS

42 USCS § 1988

§ 1988. Proceedings in vindication of civil rights.

(b) Attorney's fees. In any action or proceeding to enforce a provision of sections 1977, 1977A, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1681 et seq.], the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], or section 40302 of the Violence Against Women Act of 1994, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

APPENDIX E

CALIFORNIA CODES

BUSINESS & PROFESSIONS CODE

Division 8. Special Business Regulations

CHAPTER 4. HORSE RACING

Article 8.5. Equine Medication

B.&P. Code § 19580

§ 19580. Adoption of regulations relating to equine medication; Legislative intent.

(a) The board shall adopt regulations to establish policies, guidelines, and penalties relating to equine medication in order to preserve and enhance the integrity of horse racing in the state. Those policies, guidelines, and penalties shall include, at a minimum, the provisions set forth in this article.

(b) It is the intent of the Legislature that the board, in its testing efforts to determine illegal or excessive use of substances, recognize the greater importance of conducting complete and thorough testing of a lesser number of samples in preferences to conducting less thorough testing on a greater number of samples.

CALIFORNIA CODES

BUSINESS & PROFESSIONS CODE

Division 8. Special Business Regulations

CHAPTER 4. HORSE RACING

Article 2. General Administration and Enforcement

B.&P. Code § 19431

§ 19431. Offices; Meetings; Quorum.

The board shall establish and maintain a general office for the transaction of its business in Sacramento. The board may establish any branch office for the transaction of its business at a place to be determined by it, and may hold meetings at any other place within the state when the interests of the public may be better served.

A public record of every vote shall be maintained at the board's general office.

At least four members of the board shall concur in the taking of any official action or in the exercise of any of the board's duties, powers, or functions.

CALIFORNIA CODES

GOVERNMENT CODE

Title 2. Government of the State of California

Division 3. Executive Department

Part 1. State Departments and Agencies

CHAPTER 5. ADMINISTRATIVE ADJUDICATION: FORMAL HEARING

Government Code § 11517

§ 11517. Contested cases.

(a) A contested case may be originally heard by the agency itself and subdivision (b) shall apply. Alternatively, at the discretion of the agency, an administrative law judge may originally hear the case alone and subdivision (c) shall apply.

(b) If a contested case is originally heard before an agency itself, all of the following provisions apply:

(1) An administrative law judge shall be present during the consideration of the case and, if requested, shall assist and advise the agency in the conduct of the hearing.

(2) No member of the agency who did not hear the evidence shall vote on the decision.

(3) The agency shall issue its decision within 100 days of submission of the case.

(c) (1) If a contested case is originally heard by an administrative law judge alone, he or she shall prepare within 30 days after the case is submitted to him or her a proposed decision in a form that may be adopted by the agency as the final decision in the case. Failure of the administrative law judge to deliver a proposed decision within the time required does not prejudice the rights of the agency in the case. Thirty days after the receipt by the agency of the proposed decision, a copy of the proposed decision shall be filed by the agency as a public record and a copy shall be served by the agency on each party and his or her attorney. The filing and service is not an adoption of a proposed decision by the agency.

(2) Within 100 days of the receipt by the agency of the administrative law judge's proposed decision, the agency may act as prescribed in subparagraphs (A) to (E), inclusive. If the agency fails to act as prescribed in subparagraphs (A) to (E), inclusive, within 100 days of receipt of the proposed decision, the proposed decision shall be deemed adopted by the agency. The agency may do any of the following:

(A) Adopt the proposed decision in its entirety.

(B) Reduce or otherwise mitigate the proposed penalty and adopt the balance of the proposed decision.

(C) Make technical or other minor changes in the proposed decision and adopt it as the decision. Action by the agency under this paragraph is limited to a clarifying change or a change of a similar nature that does not affect the factual or legal basis of the proposed decision.

(D) Reject the proposed decision and refer the case to the same administrative law judge if reasonably available, otherwise to another administrative law judge, to take additional evidence. If the case is referred to an administrative law judge pursuant to this subparagraph, he or she shall prepare a revised proposed decision, as provided in paragraph (1), based upon the additional evidence and the transcript and other papers that are part of the record of the prior hearing. A copy of the revised proposed decision shall be furnished to each party and his or her attorney as prescribed in this subdivision.

(E) Reject the proposed decision, and decide the case upon the record, including the transcript, or upon an agreed statement of the parties, with or without taking additional evidence. By stipulation of the parties, the agency may decide the case upon the record without including the transcript. If the agency acts pursuant to this subparagraph, all of the following provisions apply:

(i) A copy of the record shall be made available to the parties. The agency may require payment of fees covering direct costs of making the copy.

(ii) The agency itself shall not decide any case provided for in this subdivision without affording the parties the opportunity to present either oral or written argument before the agency itself. If additional oral evidence is introduced before the agency itself, no agency member may vote unless the member heard the additional oral evidence.

(iii) The authority of the agency itself to decide the case under this subdivision includes authority to decide some but not all issues in this case.

(iv) If the agency elects to proceed under this subparagraph, the agency shall issue its final decision not later than 100 days after rejection of the proposed decision. If the agency elects to proceed under this subparagraph, and has ordered a transcript of the proceedings before the administrative law judge, the agency shall issue its final decision not later than 100 days after receipt of the transcript. If the agency finds that a further delay is required by special circumstance, it shall issue an order delaying the decision for no more than 30 days and specifying the reasons therefor. The order shall be subject to judicial review pursuant to Section 11523.

(d) The decision of the agency shall be filed immediately by the agency as a public record and a copy shall be served by the agency on each party and his or her attorney.

CALIFORNIA CODES

PUBLIC CONTRACT CODE

Division 2. General Provisions

Part 2. Contracting by State Agencies

Chapter 2. State Acquisition of Goods and Services

ARTICLE 4. CONTRACTS FOR SERVICES

Public Contract Code § 10335

§ 10335. Applicability of article.

(a) This article shall apply to all contracts, including amendments, entered into by any state agency for services to be rendered to the state, whether or not the services involve the furnishing or use of equipment, materials, or supplies or are performed by an independent contractor. Except as provided in Section 10351, all contracts subject to this article are of no effect unless and until approved by the department. Each contract shall be transmitted with all papers, estimates, and recommendations concerning it to the department and, if approved by the department, shall be effective from the date of approval.

(d) Contracts subject to the approval of the department shall also have the department's approval for a modification or amendment thereto, with the following exceptions:

(1) An amendment to a contract that only extends the original time for completion of performance for a period of one year or less is exempt. If the original contract was subject to approval by the department, one fully executed copy including transmittal document, explaining the reason for the extension, shall be sent to the legal office of the department. A contract may only be amended once under this exemption.

(2) Contracts let or awarded on the basis of a law requiring competitive bidding may be modified or amended only if the contract so provides or if authorized by the law requiring competitive bidding.

(3) If an amendment to a contract has the effect of giving the contract as amended an increase in monetary amount, or an agreement by the state to indemnify or save harmless any person, the amendment shall be approved by the department.

APPENDIX F

CALIFORNIA CODE OF REGULATIONS

Title 4. Business Regulations

Division 4. California Horse Racing Board

ARTICLE 15. VETERINARY PRACTICES

4 C.C.R. 1843

§ 1843. Medication, Drugs and other Substances.

It shall be the intent of these rules to protect the integrity of horse racing, to guard the health of the horse, and to safeguard the interests of the public and the racing participants through the prohibition or control of all drugs, medications and drug substances foreign to the horse. In this context:

(a) No horse participating in a race shall carry in its body any drug substance or its metabolites or analogues, foreign to the horse except as hereinafter expressly provided.

(b) No drug substance shall be administered to a horse which is entered to compete in a race to be run in this State except for approved and authorized drug substances as provided in these rules.

(c) No person other than a licensed veterinarian or animal health technician shall have in his/her possession any drug substance which can be administered to a horse, except such drug substance prescribed by a licensed veterinarian for a specific existing condition of a horse and which is properly labelled.

(d) A finding by an official chemist that a test sample taken from a horse contains a drug substance or its metabolites or analogues which has not been approved by the Board, or a finding of more than one approved non-steroidal, anti-inflammatory drug substance, or a finding of a drug substance in excess of the limit established by the Board for its use shall be prima facie evidence that the trainer and his/her agents responsible for the care of the horse has/have been negligent in the care of the horse and is prima facie evidence that the drug substance has been administered to the horse.

CALIFORNIA CODE OF REGULATIONS

Title 4. Business Regulations

Division 4. California Horse Racing Board

ARTICLE 15. VETERINARY PRACTICES

4 C.C.R. 1843.1

§ 1843.1. Prohibited Drug Substances.

For purposes of this division, prohibited drug substance means:

(a) any drug, substance, medication or chemical foreign to the horse, whether natural or synthetic, or a metabolite or analog thereof, whose use is not expressly authorized in this article.

(b) any drug, substance, medication or chemical authorized by this article in excess of the authorized level or other restrictions as set forth in this article.

CALIFORNIA CODE OF REGULATIONS

Title 4. Business Regulations

Division 4. California Horse Racing Board

ARTICLE 15. VETERINARY PRACTICES

4 C.C.R. 1858

§ 1858. Test Sample Required.

Blood and urine test samples shall be taken daily from the winner of every race, from horses finishing second and third in any stakes race with a gross purse of $75,000 or more, and from not less than six or more than nine other horses designated for testing by the stewards or the official veterinarian. Every horse within the inclosure or entered in any race is subject to testing and no owner, trainer or other person having the care of a horse shall refuse to submit it for testing when directed by the stewards or the official veterinarian.

CALIFORNIA CODE OF REGULATIONS

Title 4. Business Regulations

Division 4. California Horse Racing Board

ARTICLE 15. VETERINARY PRACTICES

4 C.C.R. 1859

§ 1859. Taking, Testing and Reporting of Samples.

(a) Urine, blood or other official test samples shall be taken under the direction of the official veterinarian or their designee. All samples shall be taken in a detention area approved by the Board, unless the official veterinarian approves otherwise. The taking of any test sample shall be witnessed, confirmed or acknowledged by the trainer of the horse being tested or their agent or employee, and may be witnessed by the owner, trainer or other person designated by them. All official test samples shall be sent to the official laboratory approved and designated by the Board, in such manner as the Board may direct. All required samples shall be in the custody of the official veterinarian, their assistants or other persons approved by them, from the time they are taken until they are delivered to the custody of the official laboratory.

(b) If the official laboratory fails to detect in the official test samples, a prohibited drug substance, as defined in this article, the official sample shall be discarded immediately.

(c) The Executive Director and the Equine Medical Director shall immediately be notified by the official laboratory of each finding that an official test sample contains a prohibited drug substance, as defined in this article. The official laboratory shall further provide all information and data on which the finding is based to the Equine Medical Director, and shall transmit its official report of the finding to the Executive Director, within five (5) working days after the initial notification is made.

(d) The Board has the authority to direct the official laboratory to retain and preserve by freezing samples for future analysis.

(e) The fact that purse money has been distributed prior to the issuance of a laboratory report shall not be deemed a finding that no drug substance prohibited by this article has been administered, in violation of these rules, to the horse earning such purse money.

CALIFORNIA CODE OF REGULATIONS

Title 4. Business Regulations

Division 4. California Horse Racing Board

ARTICLE 15. VETERINARY PRACTICES

4 C.C.R. 1859.25

§ 1859.25. Split Sample Testing.

(a) In addition to the blood and urine official test samples transmitted to the official laboratory for testing as provided in Rule 1859 of this Article, the Board shall maintain a portion of the official test sample for each horse tested if sufficient sample is available after the official test samples are taken. That portion shall be designated the split sample. The Board makes no guarantee as to the amount of sample which will be available for the split sample. All samples taken by representatives of the Board are under the jurisdiction of and shall remain the property of the Board at all times. The Board shall ensure the security and storage of the split sample.

(b) When the Executive Director or the Executive Director's designee is notified of a finding by the official laboratory that a test sample from a horse participating in any race contained a prohibited drug substance as defined in this Article, the Executive Director, after consulting with the Equine Medical Director or the Equine Medical Director's designee as to the presence of the prohibited drug substance shall notify a Supervising Investigator. The owner and the trainer shall be confidentially notified of the finding by a Supervising Investigator or his/her designee and the owner and

trainer shall each have 72 hours from the date he or she is notified to request that the split sample of the official test sample that was found to contain the prohibited drug substance(s) be tested by an independent Board approved laboratory.

(c) If the owner or trainer wishes to have the split sample tested, he or she shall comply with the following procedures:

(1) The request shall be made on CHRB-56, (Rev. 5/97), Request to Release Evidence, which is hereby incorporated by reference. CHRB-56 shall be made available at all CHRB offices.

(2) The owner or trainer requesting to have the split sample tested shall be responsible for all charges and costs incurred in transporting and testing the split sample. By signing CHRB-56, the owner or trainer certifies he or she has made arrangements for payment to the designated Board-approved laboratory for laboratory testing services.

(3) Verification of payment for costs incurred in transporting and testing the split sample must be received by the CHRB within five (5) working days from the CHRB receipt of CHRB-56. If such verification of payment is not received, the split sample, will not be released or shipped to the Board-approved laboratory designated by the owner or trainer to test the split sample and the owner and trainer will have relinquished his/her right to have the split sample tested. If a complaint issues, the only test results that will be considered will be the results from the Board's official laboratory.

(d) Upon approval by the Executive Director or the Executive Director's designated representative of a valid request on CHRB-56, CHRB-29 (Rev. 5/97), Authorization to Release Split Sample Urine Evidence, or CHRB-29A (Rev. 5/97), Authorization to Release Split Sample Blood Evidence, which are hereby incorporated by reference, shall be completed and the Board shall ensure that the split sample is sent to the designated laboratory for testing.

(1) If the findings by the independent Board-approved laboratory fail to confirm the findings of the prohibited drug substance as reported by the official laboratory, it shall be presumed that the prohibited drug substance was not present in the official sample.

(2) If the findings by the independent Board-approved laboratory confirm the findings of the prohibited drug substance as reported by the official laboratory, the Executive Director shall report these findings to the Board within 24 hours after receiving confirmation of the prohibited drug substance in the split sample.

(e) If the owner or trainer fails to request the testing of the split sample in accordance with the procedures specified in this rule, they shall be deemed to have waived their rights to have the split sample tested.

(f) Results of the official test sample and the split sample shall be, and shall remain, confidential and shall be provided only to the Executive Director or the Executive Director's designee, the Board, the Equine Medical Director or the Equine Medical Director's designee, and to the owner and trainer, unless or until the Board files an official complaint or accusation.

CALIFORNIA CODE OF REGULATIONS

Title 4. Business Regulations

Division 4. California Horse Racing Board

ARTICLE 16. GENERAL CONDUCT

4 C.C.R. 1887

§ 1887. Trainer to Insure Condition of Horse.

(a) The trainer is the absolute insurer of and responsible for the condition of the horses entered in a race, regardless of the acts of third parties, except as otherwise provided in this article. If the chemical or other analysis of urine or blood test samples or other tests prove positive showing the presence of any prohibited drug substance defined in Rule 1843.1 of this division, the trainer of the horse may be fined, his/her license suspended or revoked, or be ruled off. In addition, the owner of the horse, foreman in charge of the horse, groom, and any other person shown to have had the care or attendance of the horse, may be fined, his/her license suspended, revoked, or be ruled off.

(b) Notwithstanding the above, if the Board or its agents fail to notify a trainer of a potential positive test within 18 calendar days from the date the sample was taken, the trainer shall not be deemed responsible under this section unless it is shown by the preponderance of the evidence that the trainer administered the drug or other prohibited substance defined in Rule 1843.1 of this division, caused the administration or had knowledge of the administration.

CALIFORNIA CODE OF REGULATIONS

Title 4. Business Regulations

Division 4. California Horse Racing Board

ARTICLE 16. GENERAL CONDUCT

4 C.C.R. 1888

§ 1888. Defense to Trainer Insurer Rule.

A trainer or other person charged with a violation of Rule 1887 of this division may defend, mitigate or appeal the charge if:

(a) He was not, before the commencement of any proceeding against him, informed of the charges being brought against him;

(b) He was not permitted counsel, representation or an advisor of his choosing in any hearing before the stewards concerning the charges;

(c) He shows, by a preponderance of evidence, that he made every reasonable effort to protect the horses in his care from tampering by unauthorized persons; and

(d) He was not permitted to introduce evidence in his own behalf before any finding or ruling was made against him. Nothing herein shall require that the stewards permit cross-examination of any witness appearing before them, or issue subpoenas for the attendance of witnesses.

APPENDIX G

STATE OF CALIFORNIA

California Horse Racing Board

HORSEMEN'S HANDBOOK
CONCERNING
MEDICATION RULES AND REGULATIONS

DEFENSE TO TRAINER INSURER RULE: MITIGATING CIRCUMSTANCES

A trainer or other person who is charged with a violation of Rule 1887, Trainer to Insure Condition of Horse, may, in the course of the hearing, present mitigating circumstances in defense to the trainer insurer rule. The burden of producing evidence of mitigating circumstances is upon the accused licensee, and while not all encompassing, the following are examples of situations which may constitute mitigating circumstances:

(a) Evidence of accidental or environmental contamination of feed and other substances, unless it is shown that the accidental or environmental contamination:

(1) could have been prevented had reasonable precautions been taken; and

(2) the accused licensee would be the person expected to take such reasonable precautions; and

(3) the accused licensee failed to take such reasonable precautions.

(b) Evidence of third party tampering. Mitigating circumstances may be found to exist where a preponderance of the evidence presented at the hearing establishes to the satisfaction of the stewards that the presence of the drug substance detected was the result of third party intervention or tampering with the horse which the accused licensee could not reasonably have been expected to prevent, as described in Rule 1888(c).

(c) Changes in Testing Procedures. Changes in the levels specified for the authorized drug substances in 1844(e), as a result of changes in testing methodologies, will be publicly noticed prior to adoption.

(d) Residue Levels of Therapeutic Medication. If administered under the direction or prescription of a licensed veterinarian, levels of those therapeutic substances, specifically authorized in Rule 1844, and not exceeding the levels designated in urine test samples, shall be considered as authorized medication. Levels found in excess of those prescribed in Rule 1844 shall be considered violations of that rule.

Supreme Court, U.S.
FILED

(2)

No. 03-606 OCT 13 2003

In The

Supreme Court of the United States

BOB BAFFERT,

Petitioner,

v.

CALIFORNIA HORSE RACING BOARD, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL APPENDIX

NEIL PAPIANO, ESQ. (CSB# 031811)
IVERSON, YOAKUM, PAPIANO & HATCH
624 South Grand Avenue, 27th Floor
Los Angeles, California 90017-3328
Telephone: (213) 624-7444
Facsimile: (213) 629-4563

Counsel of Record for Petitioner
BOB BAFFERT

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SUPPLEMENTAL APPENDICES

APPENDIX H

Opinion And Decision Of The United States District Court, Central District Of California, On Respondents Motion To Dismiss For Lack Of Subject Matter Jurisdiction Pursuant To Younger Abstention 42a

[EOR 0681] UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BOB BAFFERT, Plaintiffs, vs. CALIFORNIA HORSE RACING BOARD, ROY C. WOOD, JR., IN HIS CAPACITY AS THE EXECUTIVE DIRECTOR OF THE CALIFORNIA HORSE RACING BOARD; AND ROBERT H. TOURTELOT, JOHN C. HARRIS, SHERYL L. GRANZELLA, MARIA G. MORETTI, ALAN W. LANDSBURG, WILLIAM A. BIANCO, AND ROGER H. LICHT, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE CALIFORNIA HORSE RACING BOARD, Defendants.	CASE NO. CV 01-07363 DT (BQRx) ORDER (1) **GRANTING** PLAINTIFF'S REQUEST FOR JUDICIAL NOTICE (2) **GRANTING** DEFENDANTS' REQUEST FOR JUDICIAL NOTICE (3) **DENYING DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT** (4) **GRANTING** PLAINTIFF'S SECOND MOTION FOR PRELIMINARY INJUNCTION (Filed Nov. 19, 2001)

I. Background

A. Factual Summary

This action is brought by Plaintiff Bob Baffert ("Plaintiff") for violation of his constitutional rights pursuant to 42 U.S.C. § 1983 for violation of Plaintiff's constitutional right to a fair administrative hearing against Defendants [EOR 0682] California Horse Racing Board, Roy C. Wood,

Jr., Robert H. Tourtelot, John C. Harris, Sheryl L. Granzell, Maria G. Moretti, Alan W. Landsburg, William A. Bianco, and Roger H. Licht (collectively, "Defendants").

The following facts are alleged in Plaintiff's First Amended Complaint ("FAC"):

Plaintiff is a trainer of thoroughbred race horses licensed by the California Horse Racing Board ("CHRB"), which is an administrative agency of the State of California overseeing the State's horse racing industry. *See* FAC, ¶ 5.

Defendant Wood is the Executive Director of the CHRB, and Defendants Tourtelot, Harris, Granzella, Moretti, Landsburg, Bianco, and Licht are members of the Board of the CHRB, all of whom are being sued in their official capacities with the CHRB. *See id.* at ¶ 6.

On May 3, 2000, a urine sample was obtained from the thoroughbred filly, Nautical Look, a horse trained by Plaintiff, following the horse's victory of the seventh race at Hollywood Park. *See id.* at ¶ 12. The urine sample was alleged by the CHRB to contain approximately seventy-three (73) nanograms per milliliter of morphine (73 billionths of one gram), a pharmacologically insignificant trace amount which could not affect the performance of a horse in any way. *Id.* At the time of the race, Plaintiff was in Kentucky training an entrant in the Kentucky Derby.

Based on the finding by Truesdail Laboratories ("Truesdail"), Defendants' primary laboratory of equine drug testing, of the presence of trace amounts of morphine in the horse's urine sample, Defendants filed a complaint against Plaintiff alleging a violation of the Trainer Insurer Rule, section 1887 of the California Code of Regulations

("CCR"). Additionally, the CHRB charged Plaintiff with violating CCR Rule 1843(d), which provides that a finding by an [EOR 0683] official chemist that a test sample from a horse contains a substance not approved by the CHRB "shall be prima facie evidence that the trainer and his/her agents responsible for the care of the horse has/have been negligent in the care of the horse and is prima facie evidence that the drug substance has been administered to the horse." Id. at paragraph 14.

To carry its burden of proof to establish a violation of the Trainer Insurer Rule, Defendants must establish their case by clear and convincing evidence. Id. at paragraph 15. At the hearing before the Board of Stewards, which comprises lay persons who are employees of the CHRB, Id. at paragraph 15; Defendants attempted to establish Plaintiff's violation of the Trainer Insurance Rule by relying exclusively on the evidence of a positive urine test and the presumptions of CCR Rule 1843(b). The only scientific evidence capable of rebutting the Agency's evidence would have been blood samples which were obtained concurrently with the urine sample. Id. at para 14. Truesdail Laboratories, however, destroyed the samples. Id. at para. 15.

It was not until the hearing before the board of Stewards that Defendants disclosed for the first time that Defendants (1) did not perform any confirming tests of the blood samples after the urine sample had allegedly tested positive for morphine, as required by regulation and law and the Agency's publicly bid contract with its own testing laboratory, and (2) had intentionally destroyed the blood samples. Id. at Paragraph 16. In so doing, Defendants disclosed to the Board of Stewards their failure to comply with the California Horse Racing laws under the Business

and Professions Code §19580, the equine medication Rules and Regulations, CCR Rules §§1843, 1843.2 and 1843.5, and with the express language of the CHRB's publicly bid contract with Truesdail Laboratories. Id. at paragraphs 16-17. Defendants' conduct thus prevented Plaintiff from producing [EOR 0684] evidence that would rebut and overcome the rebuttable presumptions in the Agency's regulations that Plaintiff was negligent in the care of the horse or that the drug had been administered to the horse. Id. at paragraph 16.

The following uncontradicted evidence appears in the record of the proceedings before the CHRB's Board of Stewards:

(a) Plaintiff was in Kentucky at the time of the alleged incident and had not been present in California for more than a week theretofore.

(b) After every California thoroughbred horse race, blood and urine samples are taken from the winner and two other horses. The samples are then analyzed by the CHRB's laboratory for the presence of prohibited substances in accord with California Horse Racing Laws under the Business and Professions Code §19580, the equine medication Rules and Regulations, CCR Rules §§1843, 1843.2 and 1843.5, and with the express language of the CHRB's publicly bid contract with Truesdail Laboratories.

(c) In this case, as in every case, two vials of blood were extracted from the horse Nautical Look and were held by Defendants. Each sample was marked with an identifying label. One vial of blood and one container of urine were sent to Truesdail Laboratories for testing. The other vial

of blood was sent to the CHRB's office's in Sacramento and stored as a "split sample."

(d) CHRB publicly and competitively contracted with Truesdail Laboratories to provide testing of the blood and urine samples obtained after every California horse race. The contract provides that "[e]very equine urine and blood sample shall be initially tested to [EOR 0685] detect any and all drug substances foreign to the horse." The contract further states:

> "In the event that an analytical finding is made in a post race urine the corresponding blood sample must also be further tested for the presence of the compound found in the urine sample."

(e) No confirmatory blood tests were conducted in this case on either the blood sample in Truesdail's possession or on the split sample in the CHRB's possession. Both blood samples were destroyed by Defendants prior to being tested.

(f) Dr. Norman Hester, the Technical Director of Truesdail Laboratories, testified before the Board of Stewards that the urine sample was tested and allegedly found positive for the presence of a trace amount of morphine, approximately 73 nanograms. Dr. Hester testified as an expert witness before the Board of Stewards that this amount is a pharmacologically insignificant amount which could not have affected the performance of the horse.

(g) Dr. Hester also testified Nautical Look's blood sample in Truesdail's possession was not tested to confirm the presence of morphine allegedly detected in the urine sample, but the blood sample was intentionally discarded prior to being tested.

(h) The CHRB's Equine Medical Director, Dr. Ronald C. Jensen, testified the second blood sample (the "split" sample), which was held in an evidence locker in Sacrimento, was intentionally destroyed after the Agency was notified by Truesdail the urine sample from Nautical Look had testified positive for a minute amount of [EOR 0686] morphine, before the CHRB filed its complaint and instituted administrative proceedings against Plaintiff.

(i) Defendants failed to inform any trainers or horsemen of Defendants' policy of destroying blood samples and not performing confirmatory blood tests. Plaintiff first discovered this information at the hearing before the Board of Stewards.

Id. at paragraph 17. Additionally, Plaintiff raised an important argument attacking the validity of Defendants' evidence. Dr. Stephen A. Barker of the Louisiana State University School of Medicine, Plaintiff's expert witness, testified that the trace level of morphine found in Nautical Look's urine could have been the result of accidental environmental contamination of the horse's feed, and was not consistent with intentional administration of the drug. Dr. Barker further testified that if blood samples had been preserved and tested for morphine and the test result was negative or reported at a low trace level (in "nanograms"), this scientific evidence would have raised questions as to whether the urine test was in error, whether it had been compromised, and, at the very least, presented conclusive proof that there could not have been an intentional administration of morphine to the horse prior to the race, thereby rebutting the prima facie argument evidence relied on by Defendants pursuant to C.C.R. Rule 1843(d),

that Plaintiff was negligent in the care of his horse and that morphine had been administered to the horse. Id. at 21.

Notwithstanding that evidence, at the conclusion of the hearing the Board of Stewards ruled Plaintiff had violated the Trainer Insurance Rule and imposed a sixty day suspension of his training license and a fine of $10,000.00. Such a suspension would require all horses in training with Plaintiff be transferred to [EOR 0687] others to continue to race and would likely result in the permanent loss of these horses by Plaintiff. Id. at 15.

In contravention of their own rules and regulations to test both urine and blood samples, Defendants secretly discarded and destroyed the official and split blood samples, thereby depriving Plaintiff of his right to defend himself in the disciplinary hearings with scientific exculpatory evidence, Id. at paragraph 18.

In addition to those Constitutional violations, Defendants' secret policy and procedure of discarding blood samples violates California Business and Professions Code provisions regarding the administration and enforcement of the CHRB's powers. Section 19431 of the Business and Professions Code requires concurrence by at least four board members for any official action or "exercise of any of the board's duties, powers, or functions," and that a public record of every such vote be maintained at the board's general office. The policy of discarding one third of all daily blood samples does not appear in any public record. Id. at 19.

Defendants' secret policy of destroying blood samples also directly violates the express intent of the California

Legislature as stated in the California Business and Professions Code § 19580, which provides:

> "(a) The board shall adopt regulations to establish policies, guidelines, and penalties relating to equine medication in order to preserve and enhance the integrity of horse racing in the state. Those policies, guidelines, and penalties shall include, at minimum, the provisions set forth in this article.
>
> (b) It is the intent of the Legislature that the board, in its testing efforts to determine illegal or excessive use of substances, *recognize the greater importance of conducting complete and thorough testing of a lesser number of samples in preference to* [EOR 0688] *conduction less thorough testing on a greater number of samples.*" [Emphasis added.]

Defendants, in their official capacity as members of the CHRB, have failed to conduct "complete and thorough testing" of Nautical Look's blood samples, and have therefore failed to comply with § 19580. Id. at paragraph 20.

Defendants' conduct in failing to perform a confirming blood test as required by their rules and regulations of State law and the publicly bid contract, as well as their secret practice of destroying blood samples, has resulted and continues to result in the violation of California laws and regulations and a deprivation of Plaintiff's Constitutional due process rights. Plaintiff cannot receive a fair hearing before the Board of Stewards or a fair trial before an administrative law judge or court of law in the continuing administrative proceedings in progress because he has

been irrevocably deprived by Defendants of the opportunity to rebut the evidence and presumptions against him.

By violating California's rules and regulations and its own publicly contracted bid, and by continuing to pursue administrative proceedings against Plaintiff, Defendants have denied and continue to deny Plaintiff a Constitutionally fair hearing by destroying the only available exculpatory evidence which would demonstrate the urine test was either a false positive because there was no confirming test of morphine in the blood, or that the finding in the urine was the result of accidental environmental contamination rather than a pre-race administration by Plaintiff or his agents. As a result of Defendants' intentional destruction of the blood samples, Plaintiff is denied the opportunity to rebut the evidence against him, a right entitled to him under California Government Code § 11513(b). Id. at 23.

[EOR 0689] Defendants, in their official capacity, are both an investigative and a prosecutorial entity. As such, they had control over the blood samples and a duty to preserve the evidence for testing by Plaintiff, especially evidence they knew or should have known had exculpatory value. Id. at 24.

Upon discovery of these facts, Plaintiff moved to dismiss the complaint before the Board of Stewards, which was summarily denied after the Stewards consulted the Attorney General's office, the same body prosecuting Plaintiff for Defendants.

Plaintiff continues to be subjected to disciplinary proceedings by Defendants, including a hearing before an administrative law judge, which could result in a

suspension or loss of his trainer's license, and at the very least, the loss of future income for years and irreparable injury to his reputation as a result of a suspension.

Any attempt by Plaintiff to exhaust his administrative remedies before the CHRB, and any action in the State Court to overturn the Agency's final decision, constitutes an inadequate and costly remedy because the only potentially exculpatory evidence available to Plaintiff has been destroyed by Defendants. Additionally, under Calfirnia Government code §11517, the case will be assigned for a second trial before an administrative law judge. After a full hearing, the ALJ's decision will not be binding upon the CHRB, but may be rejected. The Board is free to order another trial before the ALJ, or impose their own decision and penalties against Plaintiff if they disagree with the ALJ's decision. This process can continue indefinitely. Only after a final decision by the CHRB, and after a penalty is imposed, can Plaintiff seek a writ in State Court for relief. The proceedings are costly, time consuming, and continue to deprive Plaintiff of his [EOR 0690] constitutional right to a fair trial because of the destruction of evidence that would exonerate him. Id. at 27.

As a result of Defendants' unconstitutional conduct, Plaintiff will suffer irreparable damage to his reputation and his ability to earn a living at his chosen profession. Additionally, Defendants have denied and continue to deny Plaintiff his fundamental right to due process of law under the Fourtheenth [sic] Amendment, in violation of 42 U.S.C. §1983.

Plaintiff contends injunctive relief is the appropriate remedy in civil rights actions under 42 U.S.C. §1983, particularly in a case such as this, where Defendants

pursuit of accusations against Plaintiff will result in the continuing deprivation of Plaintiff's Constitutional rights. Plaintiff asks this Court to enjoin further pursuit of administrative proceedings against Plaintiff under the Trainer Insurance Rule; to require Defendants to dismiss the complaint against Plaintiff in any such administrative proceedings; or in the alternative, enjoin the admission or use of the urine test results in any further state administrative proceedings and strike the purported urine sample test results from the record of the Board of Stewards' hearing. Additionally, Plaintiff requests reasonable attorney fees and costs, in accord with 42 U.S.C. § 1988(b).

B. Procedural Summary

On August 23, 2001, Plaintiff filed a Complaint for Injunctive Relief and a Motion for a Preliminary Injunction. Plaintiff subsequently filed a Notice of Withdrawal of his Motion for Preliminary Injunction on September 19, 2001.

On August 27, 2001, this Court filed a Standing Order with Regard to Newly Assigned Cases.

On September 17, Defendant California Horse Racing Board filed a Motion to Dismiss and a Request for Judicial Notice in Support of the Motions to Dismiss. [EOR 0691] Defendant subsequently filed a Notice of Withdrawal of its Motion to Dismiss on September 28, 2001.

On September 27, 2001, Plaintiff filed a First Amended Complaint for Injunctive Relief pursuant to 42 U.S.C. § 1983 on the ground that Defendant's destruction of exculpatory evidence denied Plaintiff a fair hearing in an administrative disciplinary hearing by Defendant.

On October 22, 2001, Defendants filed a Motion to Dismiss the First Amended Complaint and a Request for Judicial Notice in Support of the Motion to Dismiss, which are presently before this Court.

On October 29, 2001, Plaintiff filed a Notice of Motion and Motion for a Preliminary Injunction and a Request for Judicial Notice in Support of the Motion of a Preliminary Injunction, which are presently before the Court.

II. Discussion

A. Standard

1. Request for Judicial Notice

A court must take judicial notice if a party requests it and supplies the court with the requisite information. Fed. R. Evid. 201(d); *see Papai v. Harbor Tub and Barge Co.*, 67 F.3d 203, 207, n.5 (9th Cir.1995). "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). This Court may take judicial notice of facts outside the pleadings without converting the motion to one for summary judgment. *See Mack v. South Bay Beer Distributors*, 798 F.2d 1279, 1282 (9th Cir. 1986) (citing *Sears, Roebuck & Co. v. Metropolitan Engravers, Ltd.*, 245 F.2d 67, 70 (9th Cir. 1956)).

[EOR 0692] A court may take judicial notice of "records and reports of administrative bodies." *Mack*, 798 F.2d at 1282 (citing *Interstate Natural Gas Co. v. Southern California Gas Co.*, 209 F.2d 380, 385 (9th Cir. 1953)). In

addition, this Court may take judicial notice of its own records, and documents that are public records and capable of accurate and ready confirmation by sources that cannot reasonably be questioned. *See MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986) (courts may take judicial notice of matters of public record outside the pleadings); *United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980) (courts may take judicial notice of their own records); *United States ex rel. Robinson Rancheria v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (judicial notice of "proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue" is proper).

2. Motion to Dismiss for Lack of Subject Matter Jurisdiction

Rule 12(b)(1) of the Federal Rules of Civil Procedure recognizes dismissal of an action for lack of subject matter jurisdiction. Federal courts are "presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989). Thus, when a defendant brings a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), the plaintiff bears the burden of establishing jurisdiction. *See Kokkonen v. Guardian Life Ins.*, 511 U.S. 375, 378, 114 S. Ct. 1673, 1675 (1994). A federal court has subject matter jurisdiction over an action that either arises under federal law, or where the matter in controversy exceeds $75,000, and is between (1) citizens of different States, (2) citizens of a State and citizens or subjects of a foreign state, (3) citizens of different States and citizens or subjects of a foreign state that are an additional [EOR 0693] parties, or (4) a

foreign state as plaintiff and citizens of a State or of different States. *See* 28 U.S.C. §§ 1331, 1332(a).

3. Motion to Dismiss for Failure to State a Claim

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that a defendant may seek to dismiss a complaint for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). Pursuant to Rule 12(b)(6), the court may only dismiss a plaintiff's complaint if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Russell v. Landrieu*, 621 F.2d 1037, 1039 (9th Cir. 1980). The question presented by a motion to dismiss is not whether a plaintiff will prevail in the action, but whether a plaintiff is entitled to offer evidence in support of his claim. *Cabo Distributing Co., Inc. v. Brady*, 821 F.Supp. 601 (N.D. Cal. 1992). Dismissal is proper under Rule 12(b)(6) only where there is a lack of a cognizable legal theory, or an absence of sufficient facts alleged under a cognizable legal theory. *Balisteri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988). In testing the sufficiency of a complaint, the court must assume that all of the plaintiff's allegations are true, and must construe the compliant [sic] in a light most favorable to the plaintiff. *United States v. City of Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981) (citing *California Dump Truck Owners Assn. v. Associated General Contractors of America*, 562 F.2d 607, 614 (9th Cir. 1977); *McKinney v. DeBord*, 507 F.2d 501, 503 (9th Cir. 1974)). Therefore, it is only the extraordinary case in which dismissal is proper. *Corsican Productions v. Pitchess*, 338 F.2d 441, 442 (9th Cir. 1964).

A motion to dismiss for failure to state a claim challenges the pleadings. Unless the court decides to convert a Rule 12(b)(6) motion into a motion for summary judgment under Rule 56 and gives adequate notice of such [EOR 0694] intent, the court cannot consider material outside of the complaint. Fed. R. Civ. P. 12(b); *Levine v. Diamanthuset, Inc.*, 950 F.2d 1478, 1483 (9th Cir. 1991). The court may, however, consider exhibits submitted with the complaint and matter that may be judicially noticed pursuant to Federal Rule of Evidence 201. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1989); *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986).

In considering a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) the Court must assume that plaintiffs' allegations are true, and must construe plaintiffs' complaint in the light most favorable to plaintiffs. *See United States v. City of Redwood City*, 640 F.2d 963, 967 (9th Cir. 1981). Moreover, even if the face of the pleadings indicates that recovery is unlikely, the plaintiff is still entitled to offer evidence in support of the complaint. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Redwood City*, 640 F.2d at 967. Finally, a court may not dismiss complaints pursuant to Fed. R. Civ. P. 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Russell v Landrieu*, 621 F.2d 1037, 1039 (9th Cir. 1980).

Generally, orders granting motions to dismiss are without prejudice unless "allegations of other facts consistent with the challenged pleading could not possibly cure the defect." *Schreiber Dist. v. Serv-Well Furniture*, 806 F.2d 1393, 1401 (9th Cir. 1986).

4. Motion for Preliminary Injunction

To prevail on a motion for preliminary injunction, the moving party is required to show either a combination of probable success on the merits and the possibility of irreparable injury if relief is not granted, or the existence of serious [EOR 0695] questions regarding the merits and that the balance of hardships tips sharply in its favor. *Chalk v. U.S. District Court*, 840 F.2d 701, 704 (9th Cir. 1987); *California Cooler, Inc. v. Loretto Winery, Ltd.*, 774 F.2d 1451, 1455 (9th Cir. 1985). A showing of a reasonable likelihood of success on the merits raises a presumption of irreparable harm. *Apple Computer, Inc. v. Formula International Inc.*, 725 F.2d 521, 525 (9th Cir. 1984); (citing *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1254 (3d Cir. 1983), *cert. dismissed*, 464 U.S. 1033 (1984)). A showing of harm varies inversely with the required showing of meritoriousness. *Rodeo Collection, Ltd. v. West Seventh*, 812 F.2d 1215, 1217 (9th Cir. 1987).

A preliminary injunction is not a preliminary adjudication on the merits but rather a device for preserving the status quo and preventing the irreparable loss of rights before judgment. *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984). It is an equitable device for preserving rights pending final resolution of the dispute. *Id.* at 1423. "The district court is not required to make any binding findings of fact; it need only find probabilities that the necessary facts can be proved." *Id.* The Court must balance the equities in the exercise of its discretion. *International Jensen, Inc. v. Metrosound, U.S.A., Inc.*, 4 F.3d 819, 822 (9th Cir. 1993).

B. Analysis

1. Parties' Requests for Judicial Notice

Defendants request this Court take judicial notice of the following documents pursuant to FED.R.EVID. 201(d):

(1) Statement of Decision of the Board of Stewards in the Matter of Trainer Bob Baffert;

[EOR 0696] (2) State Order issued by the Superior Court of the state of California for the County of Los Angeles, Case No. BS 066600; and

(3) Plaintiff's Notice of Appeal to the California Horse Racing Board.

Plaintiff requests this Court take judicial notice of nineteen documents pursuant to FED.R.EVID. 201(d), specifically listed in Plaintiff's Request for Judicial Notice filed on November 5, 2001, and attached in Volumes I, II, and III of Plaintiff's Motion for Preliminary Injunction.

This Court finds that judicial notice of the above mentioned documents is appropriate because all three items are "capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned." FED.R.EVID. 201(d); *See Papai v. Harbor Tug and Barge Co.*, 67 F.3d 203, 207, n.5 (9th Cir. 1995) (judicial notice of orders and decisions made by other courts is proper); *United States ex. rel. Robinson Rancheria v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (judicial notice of "proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue" is proper); *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986) (courts may take judicial notice of matters of public record

outside the pleadings). Moreover, in reviewing the attached documents at issue, this Court finds both sides have supplied the requisite information to allow this Court to take judicial notice of the above listed items.

Based on the above, this Court hereby **GRANTS** both Plaintiff's and Defendants' Requests for Judicial Notice.

2. Motion to Dismiss for Lack of Subject Matter Jurisdiction

[EOR 0697] Defendants' Motion to Dismiss is based on Fed.R.Civ.P. 12(b)(1) and 12(b)(6). Because Fed.R.Civ.P. 12(b)(1) challeges [sic] this Court's subject matter jurisdiction, it must be addressed "first, as dismissal under this rule makes all other challeges [sic] moot." *Althin CD Medical, Inc. v. West Suburban Kidney Center, C.C.*, 874 F.Supp. 837, 839 (N.D.Ill. 1995).

Defendants seek dismissal of Plaintiff's Complaint on the ground that this Court lacks subject matter jurisdiction over this case. Defendants contend proper administrative procedures have not been exhausted. Alternatively, Plaintiff argues this Court has subject matter jurisdiction because Defendants' continued pursuit of disciplinary administrative proceedings have denied, and continue to deny, Plaintiff his right to due process of law. Plaintiff further argues he is not required to exhaust administrative remedies before appealing to this Court, and that, as a result of the power and authority of Defendants over the administrative process, such a conclusion can be forestalled indefinitely by Defendants.

Defendants argue Plaintiff's action is a gratuitous attempt to avoid state procedures and remedies, and that

the Court must dismiss Plaintiff's Complaint pursuant to *Younger v. Harris*, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S.Ct. 746 (1971).[1] The Court disagrees, and finds the Younger abstention doctrine is inappropriate here because Defendants' basis for imposition of disciplinary sanctions against Plaintiff is so flawed with error and speculative evidence.

This Court is not required to apply the Younger abstention doctrine where a plaintiff demonstrates the state agency may be pursuing disciplinary or prosecutorial administrative proceedings against him in bad faith. *See Flowers v.* [EOR 0698] *State of Hawaii*, 87 F.3d 1318 (1996). A prosecution is brought in bad faith if it is brought without a reasonable expectation of obtaining a valid conviction. *Id.* Here, the Court finds Plaintiff has demonstrate Defendants may be prosecuting him in bad faith, and therefore, Younger abstention is inappropriate to prevent further injury and embarrassment to Plaintiff.

This case is extremely similar to the facts presented in *Flowers*, in which the plaintiff, a plastic surgeon, was the subject [sic] a disciplinary action brought by the Regulated Industries Complaints Office of the State of Hawaii Department of Commerce and Consumer Affairs, the prosecutorial agency for the State of Hawaii Board of Medical Examiners. At the disciplinary hearing, the plaintiff introduced evidence showing the investigation was biased, that the defendant failed to comply with laws

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[1] Under the Younger abstention doctrine a federal court must abstain when "(i) the state proceedings are ongoing; (ii) the proceedings implicate important state interests; and (iii) the state proceedings provide an adequate opportunity to raise federal questions." *Id.*

and regulations, that notwithstanding these failures and breaches, and that despite evidence of other leading physicians and scientists that the underlying facts did not support the petition, the prosecution continued. The plaintiff alleged the disciplinary action was brought in bad faith and filed an action in federal district court under 42 U.S.C. §1983 against officials of the agency for a preliminary injunction. The district court denied the motion on abstention grounds, issuing a stay of federal proceedings pending the outcome of state disciplinary action. The Ninth Circuit reversed the district court's judgment, vacating the stay order and instructing the district court to enter a preliminary injunction on the grounds that the plaintiff demonstrated the defendants were prosecuting him in bad faith. The Court held Younger abstention was inappropriate where a prosecution is brought without a reasonable expectation of obtaining a valid conviction. *Id.* The court finds the facts of this case raise serious concerns along the lines of the *Flowers* case.

[EOR 0699] While Plaintiff does not explicitly allege Defendants are prosecuting him in bad faith, the Court finds, given the weight and sufficiency of the evidence presented before the Board of Stewards by both parties, that a valid conviction could not be obtained and sustained where Defendants failed astoundingly to comply with its own rules and regulations, thereby sacrificing the rights of Plaintiff to a fair hearing. Had the constitutional requirements of *California v. Trombetta*, 467 U.S. 479 (1984), and *Brady v. Maryland*, 337 U.S. 83 (1963), been adhered to in the proceedings, given Defendants' numerous breaches in the course of its investigation, it appears there could not have been a valid conviction without more credible evidence.

Additionally, given the circumstances here, the Supreme Court's decisions in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), and *Moses H. Cone Mem'l Hosp. v. Mercury Const. Co.*, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983), lead this Court to conclude the prudent course is for this Court not to abstain from resolving the issue. In *Colorado River* and *Moses Cone*, the Supreme Court cited the factors a federal court should consider whether the interests of wise judicial administration and a comprehensive disposition of the litigation outweigh the duty to exercise jurisdiction. The Supreme Court stated that federal courts should consider the need to avoid piecemeal litigation, the order in which state and federal proceedings were filed, and other problems that may occur with both state and federal courts exercise [sic] jurisdiction. *See Colorado River*, 424 U.S. at 818-19, 93 S.Ct. at 1246-47. In addition, the existence of a federal question weighs heavily against abstention. *See Moses Cone*, 460 U.S. at 23, 103 S.Ct. at 941. These factors should "be applied in a pragmatic and flexible manner with a view to the realities of the case at hand." *Id.* at 940.

[EOR 0700] Here the issue is essentially a Constitutional due process claim. Federal law does indeed factor into the determination of the reasonableness of Defendants' pursuit of administrative disciplinary proceedings given the factual circumstances of the case. Additionally, this Court is mindful of the Supreme Court's admonition that the abstention doctrine is only to be applied in "exceptional circumstances," Colorado River, 424 U.S. at 813, 93 S.Ct. at 1244, and this Court finds that the circumstances of this case do not warrant abstention.

Defendants raise several other points warranting discussion. They argue, in addition to the foregoing, Plaintiff's claims are not ripe because he has suffered no damages thus far. Because the enforcement of the suspension of Plaintiff's license and the monetary penalty have been stayed pending the hearing before the ALJ, Plaintiff has suffered no injury. Notwithstanding the stay order, Defendant is forced to incur expenses defending proceedings whose outcome has no enforcement power over the Board of Stewards, which has already issued a suspension and monetary penalty, and can be forestalled indefinitely at the Board's whim. The Court finds this argument without merit.

The Court also finds without merit Defendants' argument that the findings of the Board of Stewards precludes this Court from considering Plaintiff's claims. Indeed, this Court found the Board of Stewards' ruling to be at odds with the Board's own recitation of the facts contained in the ruling. The Court also finds Defendants' Eleventh Amendment claims with respect to immunity of the CHRB and its individual employees similarly without merit.

The Court finds dismissal on the ground of Plaintiff's failure to exhaust administrative procedures unwarranted in this case with these facts as presented. Because this Court has subject matter jurisdiction over the entire action, Defendant's Motion to Dismiss pursuant to Rule 12(b)(1) is **denied**.

[EOR 0701] **3. Defendants' Motion to Dismiss for failure to state a claim**

Assuming the allegations in the Complaint are true, and construing Plaintiff's Complaint in the light most favorable to Plaintiff, it does not appear beyond doubt that Plaintiff can prove no set of facts in support of his claim which would entitle him to relief by this Court. Consequently, Defendants' Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)(6) is **denied**.

4. Plaintiff's Application for Preliminary Injunction is Granted

This Application is made pursuant to Rule 65 of the Federal Rules of Civil Procedure. Injunctive relief is an extraordinary equitable remedy, which can be granted only in limited circumstances and which should not be granted in a doubtful case. A preliminary injunction is not a preliminary adjudication on the merits but rather a device for preserving the status quo and preventing the irreparable loss of rights before judgment. *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984). It is an equitable device for preserving rights pending final resolution of the dispute. *Id.* at 1423. "The district court is not required to make any binding findings of fact; it need only find probabilities that the necessary facts can be proved." *Id.*

In this instance, Plaintiff requests this Court enjoin Defendants from continuing any further administrative proceedings against Plaintiff under the Trainer Insurer Rule related to the urine test performed on Nautical Look following the seventh race at Hollywood Park on May 3, 2000, requiring Defendants to dismiss the Complaint

against Plaintiff in such administrative proceedings, or in the alternative, enjoining the admissibility of the results of the urine test in any further State administrative proceedings and striking the urine test [EOR 0702] results from the record of the Board of Stewards' hearing in the administrative action.

This Motion is based on an alleged deprivation of due process under the law, and is made on the grounds that immediate and irreparable injury will result to Plaintiff unless the activities described above are enjoined pending trial of this action. Plaintiff claims that it demonstrates a strong probability of success on the merits by the evidence submitted by both parties before the Board of Stewards. The strong showing of success on the merits raises a presumption of irreparable harm to Plaintiff.

Plaintiff argues he meets the established standards for injunctive relief. In determining whether to grant an injunction, courts analyze four factors: (1) whether the moving party is likely to prevail on the merits; (2) whether the moving party would suffer irreparable harm if an injunction were not granted; (3) whether the balance of hardships tips in the moving party's favor; and (4) the impact, if any, of an injunction on the public interest. *Hybritech, Inc. v. Abbott Lab.*, 849 F.2d 1446, 1451 (Fed. Cir. 1988). No one factor is dispositive; rather, courts balance all the factors, affording each its appropriate weight under the circumstances of the case. *Id.* Plaintiff argues that each of the four factors decidedly favors immediate injunctive relief. In opposition, Defendants contend Plaintiff's Motion for Preliminary Injunction should be denied for the reasons set forth in their Motion to Dismiss. This Court agrees with Plaintiff's position for

purposes of this Motion for the reasons which will be fully elaborated in further detail below.

a. Likelihood of Success on the Merits

Plaintiff contends he is likely to succeed in demonstrating that Defendants who are state officials are depriving him of his constitutional right to [EOR 0703] due process, that this violation is continuing and causing him irreparable harm, and there is no remedy presently available to him as a result of Defendants' actions.

The Due Process Clause of the Fourteenth Amendment requires the State to preserve for defendants in criminal cases exculpatory evidence that is material either to guilt or punishment, and a violation of that duty requires dismissal of the relevant charges. *See Brady*, 373 U.S. at 87; *Trombetta*, 467 U.S. at 488-89. Moreover, this principle applies to quasi-criminal administrative disciplinary proceedings by a state licensing agency to insure the licensee a constitutionally full and fair administrative hearing. *See Scott v. Meese*, 174 Cal.App.3d 249, 256-57 (1985). The constitutional right to due process includes the opportunity to meet and rebut evidence relied on by the state agency in support of its accusations and charges, and the right to a full, fair and impartial consideration of the issues. *See Amet v. Kennedy*, 416 U.S. 134 (1974); *Button v. Board of Administration of the Public Employees Retirement System*, 122 Cal.App.2d 370, 378 (1981).

Additionally, licenses to practice a profession are "vested rights" which require Constitutional due process before they can be affected or taken away. *See Lavin v. CHRB*, 57 Cal.App.4th 263, 268-69 (1997). Plaintiff argues he was deprived, and continues to be deprived of these

rights by Defendant's intentional and secret destruction of all potentially exculpatory evidence in this matter, and by the failure of Defendants to comply with its own rules and regulations. The evidence presented before the Board of Stewards by both parties, which is outlined above, supports these allegations. Plaintiff has established that Defendants intentionally destroyed two separate blood samples in its custody which were required to be tested following a positive urine test. The first blood [EOR 0704] sample was intentionally destroyed as part of an ongoing policy to eliminate one third of all blood samples that enter the laboratory, in contravention to the laws and regulations of the State requiring confirmatory blood testing where urine tests produce a positive result for illegal substances. The second split blood being held in an evidence locker by Defendants was intentionally and ominously destroyed following notification to Defendants by Truesdail Laboratories that the corresponding urine sample had tested positive for morphine, but before Defendants filed its complaint against Plaintiff.

It is well established that "the core duty to preserve constitutionally material evidence under the Due Process Clause of the Fourteenth Amendment remains and that duty applies to administrative hearings." *Scott v. Meese*, 174 Cal.App.3d 249 (1985). This Court finds Plaintiff is likely to succeed in establishing Defendants' conduct constituted a violation of this principle. Defendants introduced evidence of the laboratory report showing trace amounts of morphine were found in urine in order to establish a violation of the Trainer Insurer Rule. The Defendants rested their case on the basis of that evidence alone. Under the Trainer Insurer Rule, a positive urine test establishes a rebuttable presumption of prima facie

evidence of negligence and/or administration of the drug. Thereafter the burden shifts to the trainer to present contrary or mitigating evidence in order to show the drug had not been administered to the horse by the trainer or his employees and/or that the trainer was not negligent in the care of his horse. *See* Rule 1843(d). Plaintiff presented uncontradicted evidence before the Board of Stewards that preservation and testing of the blood samples, if their levels were consistent with the urine sample, would have been conclusive proof that no pre-race administration of any prohibited substance took place.

[EOR 0705] Defendants contend Plaintiff's defense does not depend on the blood tests, and in fact acknowledge the low levels of morphine found in the urine sample, as well as the likelihood that blood tests would have yielded negative results, supporting a finding that administration was improbable. Instead, Defendants argue that California has a zero tolerance standard which supports the Board's ruling that Defendant was negligent in the care of his horse, notwithstanding the very low level of morphine found in the urine sample, which could have been explained by accidental environmental contamination without implicating the level of care provided by Plaintiff. Nevertheless, Rules 1843, 1843.2 and 1843.5 require confirmatory testing presumably to prevent unwarranted proceedings and insure due process is exercised. Notwithstanding California's zero tolerance policy, Defendants violated its own rules and regulation, thereby compromising Plaintiff's constitutional rights to a fair hearing.

The Court finds Plaintiff is likely to succeed on the merits in this case.

b. Danger of Irreparable Injury

Plaintiff claims he will suffer immediate irreparable harm if Defendants at are not restrained. A showing of a reasonable likelihood of success on the merits raises a presumption of irreparable harm. *Apple Computer, Inc. v. Formula International Inc.*, 725 F.2d 521, 525 (9th Cir. 1984) (citing *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1254 (3d Cir. 1983), *cert. dismissed*, 464 U.S. 1033 (1984)). A showing of harm varies inversely with the required showing of meritoriousness. *Rodeo Collection, Ltd. v. West Seventh*, 812 F.2d 1215, 1217 (9th Cir. 1987).

i. Irreparable Harm is Presumed as a Matter of Law

[EOR 0706] Immediate irreparable harm is presumed in cases like this where the plaintiff makes a strong showing of the likelihood of success on the merits. *See, Canon Computer Sys., Inc. v. Nu-Kote Int'l Inc.*, 134 F.3d 1085, 1090 (Fed. Cir. 1998) (upholding preliminary injunction against defendant who manufactured and sold replacement cartridges for plaintiffs printers). In light of this presumption, Plaintiff's claims that it has made the requested showing of irreparable harm.

Even without such a presumption, Plaintiff alleges that the factual record here shows that the harm Defendants are causing is immediate, irreparable, and warrants a preliminary injunction. Defendants assert that Plaintiff's obtaining of an injunction is not warranted, because of the stay of Plaintiff's suspension and fine. However, this Court recognizes the Board is not obligated to accept the decision by the ALJ following a trial of this matter, and

may either render its own decision or return the matter to the ALJ for further proceedings. Moreover, Plaintiff has demonstrated his inability to provide an adequate defense as a result of Defendants' destruction of the blood samples. Additionally, Plaintiff's reputation and cash flow have been compromised. As such, this Court finds a presumption of irreparable injury in Plaintiff's favor.

c. The Balance of Hardships Tips Sharply in Plaintiff's Favor

The Ninth Circuit in *Los Angeles Memorial Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980), held that the basic function of a preliminary injunction is to preserve the status quo pending a determination of the action on the merits. The moving party may meet its burden by demonstrating either (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of [EOR 0707] hardships tips sharply in its favor. *Id.* at 1201. "These are not separate tests, but the outer reaches 'of a single continuum.'" *See, Id.*

In this instance, Plaintiff argues the third preliminary injunction factor, balance of hardships, also favors Plaintiff. Plaintiff argues the ongoing proceedings would work irreparable harm both financially and to his reputation.

Defendants argue the balance of hardships tips in their favor because of the preemption to the ongoing task of California's administrative agency's interpretation and application of its own regulations. The Court does not find this argument convincing, since the CHRB failed in numerable and ongoing ways to comply with its own regulations, and in doing so sacrificed the due process

rights of Plaintiff, and perhaps others similarly situated. This Court finds the balance of hardships tips sharply in Plaintiff's favor.

d. The Public Interest also Favors Granting of Plaintiff's Motion for Preliminary Injunction

A Preliminary Injunction is a matter of equity and while the four factors of likelihood of success, irreparable harm, balance of hardships, and public interest must be evaluated and balanced (*Illinois Tool Works, Inc. v. Grip-Pak, Inc.*, 906 F.2d 679, 681 (Fed. Cir. 1990)), "the weakness of the showing regarding one factor may be overborne by the strength of others." *Chrysler Motors Corp. v. Auto Body Panels, Inc.*, 908 F.2d 951, 953 (Fed. Cir. 1990). In general, while the public interest would favor the State's interests in interpreting and applying its own regulations, where a State agency appears to compromise the due process rights of individuals, while denying those individuals a timely remedy for raising constitutional concerns, this Court finds the public interest favors a disposition in Plaintiff's favor in granting of a preliminary injunction.

[EOR 0708] Based on the foregoing, Plaintiff has demonstrated that it is likely to prevail on the merits of its claims and will suffer irreparable injury if the Preliminary Injunction is not granted. Accordingly, this Court **GRANTS** Plaintiff's Motion for Preliminary Injunction.

III. Conclusion

Based on the foregoing discussion, this Court hereby

(1) **GRANTS** Plaintiff's and Defendants' Requests for Judicial Notice;

(2) **DENIES** Defendants California Horse Racing Board, et al.'s Motion to Dismiss First Amended Complaint;

(3) **GRANTS** Plaintiff's Second Motion for a Preliminary Injunction.

Federal Rule of Civil Procedure 65(d) requires the Court to "describe in reasonable detail . . . the act or acts sought to be restrained." As such, this Court **ORDERS** as follows:

Defendants California Horse Racing Board, Roy C. Wood, Jr., in his capacity as the Executive Director of the California Horse Racing Board, and Robert H. Tourtelot, John C. Harris, Sheryl L. Granzella, Mari G. Moretti, Alan W. Landsburg, William H. Bianco, and Roger H. Licht, in their official capacities as Members of the California Horse Racing Board, their officers, employees, agents, representatives, and all persons acting or claiming to act on its behalf of under this discretion or authority, and all persons acting in concert or in participation with it, shall be preliminary enjoined from:

> Holding and/or continuing any further proceedings in the State administrative disciplinary action entitled "In the Matter of the Complaint against Bob Baffort" before the California Horse Racing Board, Case NO. 00HP0027, until such time as the California Horse Racing Board can supply the missing blood samples which were [EOR 0709] obtained concurrently with the urine

sample of May 3, 2000 and can fully comply with the applicable State of California procedures and requirements.

This Court orders Plaintiff to post a bond in the amount of **$10,000** pursuant to Federal Rule of Civil Procedure 65(c), which states that no preliminary injunction shall issue except upon the giving of security by the applicant. This security is "in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c).

As such, Plaintiff is **ordered** to post **a bond** in the amount of **$10,000** within three (3) days of the entry of this Order. Counsel for Plaintiff is **ordered** to prepare and submit a Proposed Preliminary Injunction in accordance with this Order within three (3) days of the date of this Order.

IT IS SO ORDERED.

DATED: 11/19/2001

/s/ Dickran Tevrizian
Dickran Tevrizian, Judge
United States District Court